FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

AUGUST 1986
Volume 8
No. 8

DECISIONS

08-27-86	Amax Chemical Company	CENT 84-91-M

ADMINISTRATIVE LAW JUDGE DECISIONS

08-01-86	Rushton Mining Company	PENN 86-217-R
08-05-86	Homestake Mining Company	CENT 85-36-M
08-05-86	D. P. Frost Construction Co.	CENT 86-64-M
08-05-86	Consolidation Coal Company	WEVA 86-311-R
8-06-86	Sec. for Charles Ball v. Arch of KY, Inc.	KENT 86-93-D
08-06-86	Tunnelton Mining Company	PENN 86-65-R
08-06-86	Greenwich Collieries	PENN 86-135-R
08-06-86	Quinland Coals, Inc.	WEVA 85-169
08-07-86	Emery Mining Corporation	WEST 86-126-R
08-07-86	Utah Power & Light, Emery Mining Corp.	WEST 86-131-R
08-07-86	Utah Power & Light, Emery Mining Corp.	WEST 86-140-R
08-07-86	Utah Power & Light, Emery Mining Corp.	WEST 86-141-R
08-08-86	Alabama By-Products Corp.	SE 86-46
08-08-86	Empire Energy Corporation	WEST 86-19
08-12-86	Martha Perando v. Mettiki Coal Corp.	YORK 85-12-D
08-13-86	Jim Walter Resources, Inc.	SE 86-67
08-14-86	Dan Thompson v. Gilbert Industrial	WEST 85-77-DM
08-14-86	Southern Ohio Coal Company	WEVA 86-46-R
08-19-86	Fred O.W. Arntz v. Metric Constructors	SE 86-47-DM
08-21-86	Brown Brothers Sand Company	SE 86-12-M
08-26-86	Frank McCoart v. Elm Coal Co.	KENT 86-63-D
08-25-86	Jim Walter Resources, Inc.	SE 86-57
08-26-86	M.A. Walker Company, Inc.	KENT 85-140-M
08-28-86	Yates Construction Co., Inc.	SE 86-28-M
08-28-86	Martin Marietta Aggregates	SE 86-31-M

e County Coal Corporation v. Secretary of Labor, MSHA, Docket No.
86-58-R, 86-59-R. (Judge Melick, June 30, 1986).

etary of Labor on behalf of John Gilbert v. Sandy Fork Mining Co.,
John Gilbert v. Sandy Fork Mining Co., Docket No. KENT 86-76-D, an
86-49-D. (Judge Melick, July 3, 1986).

wich Collieries, Div. of Pennsylvania Mines Corporation v. Secreta
abor, MSHA, Docket No. PENN 85-188-R, etc. (Judge Maurer, June 14,
ial decision - Petition for Interlocutory Review).

ew was denied in the following case during the month of August:

y L. Wadding v. Tunnelton Mining Co., Docket No. PENN 84-186-D.
ge Melick, June 18, 1985).

COMMISSION DECISIONS

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 84-26-M
COTTER CORPORATION	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commiss Administrative Law Judge John A. Carlson concluded that Cotter Corpora ("Cotter") violated 30 C.F.R. § 57.18-25 (1984), a mandatory metal-non underground safety standard providing:

> No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.

7 FMSHRC 360 (March 1985)(ALJ). 1/ For the following reasons, we reve

Cotter's Schwartzwalder Mine is an underground uranium mining operation located in Jefferson County, Colorado. On October 6, 1984, Pete Redmond, a Cotter shift boss, assigned three miners to work in stopes 17-3 and 17-4 of the mine. (Stopes are excavated areas from which ore is mined in a series of steps.) The work crew consisted of Romolo Lopez, Paul Herrera and Hobby Varela. Because Lopez's partner had not reported for work that day, Redmond instructed Herrera to "bou back and forth" between Lopez and Varela. Lopez was assigned to stope 17-3 and Varela was assigned to stope 17-4. The distance between stop 17-3 and 17-4 was approximately 50-60 feet. In order to move from one stope to another, it was necessary to climb down a ladderway, walk 50- feet and then climb up another ladderway.

1/ Following the Secretary of Lahor's revision of the metal-nonmetal

0 a.m. After completing some preparatory work not involving drilling, ez was ready to drill at about 8:40 a.m. Herrera checked on Lopez at und 9:00 a.m. and stayed with him for approximately 15 minutes. As rera left stope 17-3 to go back to stope 17-4, he met Redmond, the ft boss, at the manway leading into stope 17-3. Redmond also was on way to check on Lopez. Redmond stayed with Lopez for approximately minutes, during which time Lopez was operating the drill. As Redmond t the work area, he met an inspector of the Department of Labor's e Safety and Health Administration ("MSHA"), Richard Coon, and one of ter's safety and training specialists at the bottom of the manway ding into stope 17-3.

Inspector Coon entered stope 17-3 at approximately 10:00 a.m. and erved Lopez operating the jackleg drill by himself. Coon asked Lopez re his partner was and Lopez informed him that there was no one king with him directly, but that the other two members of the crew, were in stope 17-4, checked on him periodically. Inspector Coon ed to speak to the other two crew members and sent Lopez to find m. On his way down the ladderway, Lopez met Herrera, who was coming to stope 17-3 to check on him. Inspector Coon thereafter issued an inent danger withdrawal order and citation alleging a violation of 30 .R. § 57.18-25. 2/

In his decision, Judge Carlson concluded that Cotter had violated tion 57.18-25. Relying on statistical reports concerning accidents olving rock drilling and on testimony from Inspector Coon, he found t an area in which jackleg drilling takes place is one where "hazardous ditions" exist within the meaning of section 57.18-25. 7 FMSHRC at -62. The judge applied the reasoning in Old Ben Coal Co., 4 FMSHRC 0 (October 1982), in which, analyzing a comparable "working alone" ndard (30 C.F.R. § 77.1700), the Commission held:

> [T]he standard requires [that where miners are working alone where hazardous conditions exist, there must be] communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation.

MSHRC at 1803. The judge found that the contact that Lopez had with er Cotter employees was insufficient to meet the Old Ben test. SHRC at 365-68. He ultimately held that Lopez was allowed to work ne in an area where hazardous conditions existed without sufficient tact with other miners. 7 FMSHRC at 368.

ere specific hazardous conditions existed. Cotter argues that, even suming hazardous conditions were present, the contact that Lopez had th other Cotter personnel was sufficient to meet the Commission's d Ben test.

We conclude that the evidence presented by the Secretary on the esent record fails to demonstrate that jackleg drilling is per se zardous within the meaning of section 57.18-25. We further conclude at even had hazardous conditions existed in connection with Lopez's illing, the level of contact that he had with others satisfied the quirements of the cited standard as a matter of law.

At the outset, we must dispel misconceptions as to the general aning of this "working alone" standard. Section 57.18-25 does not ohibit employees from working alone. 3/ Contrary to some of the stimony in this case (Tr. 14-15), this standard also does not contem-ate that, merely because an employee is working alone, "hazardous nditions" automatically exist. If that were the intended meaning of e regulation, its reference to "hazardous conditions" would be sur-usage. Rather, under section 57.18-25, an employee assigned a task one must have sufficient contact with others (i.e., must be able to be ard or seen) if, and only if, hazardous conditions within the meaning the regulation are associated with that task. It is equally clear at the standard does not require constant contact in such circumstances . Old Ben, supra, 4 FMSHRC at 1803-04. Thus, the real question in ses arising under section 57.18-25 where hazardous conditions are own to exist is whether the employee's contact with others, which need t be continual, was sufficient to satisfy the protective purposes of e standard.

The judge found that an area in which jackleg drilling occurs is e where "hazardous conditions" exist within the meaning of section .18-25. 7 FMSHRC at 261-62. The Secretary's position concerning this int is not clear. In his reply brief counsel for the Secretary dis-aimed the view that jackleg drilling is per se hazardous, yet during al argument seemed to agree with the judge's finding in that regard. . Oral Arg. 35-38, 42. In any event, we conclude that the judge's nding is not supported by substantial evidence.

If the Secretary wishes to prohibit certain tasks from being per-rmed alone, he may promulgate standards that expressly accomplish that d. Such a standard is not involved here.

of different drilling operations and it is impossible to determine fro the brief descriptions in many of the summaries whether jackleg drilli was specifically involved in a given accident. Moreover, some of the accidents appear to have stemmed from incidents that may not have invol drilling at all. See, e.g., Exh. P-4, Items 1, 3, 4, 5, 6 & 7. On the basis of evidence so lacking in substantive explanation, we cannot endorse the judge's virtual legislative determination that jackleg drilling is per se hazardous within the intendment of section 57.18-25. 4/

Returning to our examination of the standard in light of the facts surrounding Lopez's drilling, we agree in result with the judge that Lopez was working "alone" as that term is used in section 57.18-25. 7 FMSHRC at 364-65. As discussed above, the three-man crew that includ Lopez was divided between two worksites, stopes 17-3 and 17-4. Lopez was working in stope 17-3 while the other two members of the crew, Herrera and Varela, were assigned to stope 17-4. The distance between the stopes was approximately 50-60 feet, and travel between the stopes required climbing up one ladderway and down another. Under these circu stances, we conclude that "for practical purposes" Lopez was working alone in the particular work area to which he was assigned. See Old Be 4 FMSHRC at 1802. (As previously noted, such an assignment is not forbidden by the standard and does not, by itself, imply any violation of the standard.)

For purposes of this decision only, we will assume that specific hazardous conditions existed in connection with Lopez's work and turn t the crucial issue of whether Lopez had sufficient contact with other miners. In establishing in Old Ben a test under which such contact issues could be resolved, the Commission rejected approaches either

4/ The judge also relied upon the testimony of the inspector who issue the citation. Without detracting from the inspector's qualifications a a general expert in mine health and safety, we note his statement that he had never operated a jackleg drill (Tr. 60), his candid admission that he was not an expert on drilling (Tr. 61), and his apparent miscon- ceptions as to the general meaning of the cited regulation. Tr. 14-16. We further note that because of its age, the judge expressed some doubt as to the weight to be accorded Exh. P-1, a 1975 report on jackleg drilling prepared by MSHA's predecessor agency, MESA, based on data for the years 1973-74. 7 FMSHRC at 362. The judge assigned weight to the report largely on the basis of the subsequently prepared MSHA computer summaries but, for the reasons discussed above, we cannot conclude that these summaries lend weight to the older MESA report. Finally, some evidence s presented that the

> communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation. As the hazard increases, the required level of communication or contact increases.

4 FMSHRC at 1803. 5/

Thus, the precise issue presented is whether the contact Lopez ha with the other Cotter employees was (1) of a regular and dependable nature, and (2) commensurate with the hazard presented. The judge answered the first question in the affirmative and we agree. 7 FMSHRC at 367. Herrera, who had been assigned by the shift boss, Redmond, to assist Lopez, was aware that he was to check on Lopez on a periodic basis. He did check on Lopez around 9:00 a.m., staying with him approximately 15 minutes. He also attempted to check on Lopez a secon time shortly after 10:00 a.m.; however, the citation had already been issued. In between these two visits, Redmond also checked on Lopez, staying with him for approximately 15 minutes. Under these circumstan we affirm the judge's finding that the presence of Herrera and Redmond "was in general accord with a plan to provide periodic contact with Lopez on a regularized basis." 7 FMSHRC at 367.

The actual amount of time that other miners spent with Lopez is particularly compelling. The judge found, and the evidence shows, tha Lopez was in contact with other miners for a total of approximately 30 of the 80 minutes before being observed by the inspector. 7 FMSHRC at 366-67. This is nearly 40% of the time during which he was engaged in drilling-related activities in stope 17-3. Moreover, the actual drill consumed only about 30 minutes of the 8:40-10:00 a.m. time period involved. Also during this period Varela twice walked down towards the entrance to stope 17-3 to check on Lopez. From the sound of the drill, Varela could hear that the drilling was proceeding normally We conclude that, as a matter of law, such a substantial level of contact is sufficient to satisfy the requirements of the standard during the drilling operation at issue. Lopez was an experienced

---

5/ Section 57.18-25 refers to being heard or seen but, unlike sectio 77.1700, does not refer to "communication" with others. Like the judg (7 FMSHRC at 365-66), we do not view this difference in wording as important in this specific case, although we recognize that different issues may arise under each standard. We use the term "contact" here a convenient summary term for being heard or seen apart from any notic

nearly total lack of contact involved in Old Ben. See 4 FMSHRC at 1801-02. Therefore, on the facts involved in the present case, the judge erred in concluding that a violation of the standard occurred.

For the foregoing reasons, the decision of the administrative law judge is reversed and the civil penalty assessed by the judge is vacate

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4015 Wilson Boulevard
Arlington, Virginia 22203

Barry D. Lindgren, Esquire
Mountain States Employers Council
P.O. Box 539
Denver, Colorado 80201
for Cotter Corporation

Michael Duffy, Esquire
American Mining Congress
Suite 300
1920 N Street, N.W.
Washington, D.C. 20036

Administrative Law Judge John A. Carlson
Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
333 W. Colfax Avenue, Suite 400
Denver, Colorado 80204

Harry L. Wadding :
:
v. : Docket No. PENN 84-186-D
:
:
Tunnelton Mining Co. :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

ORDER

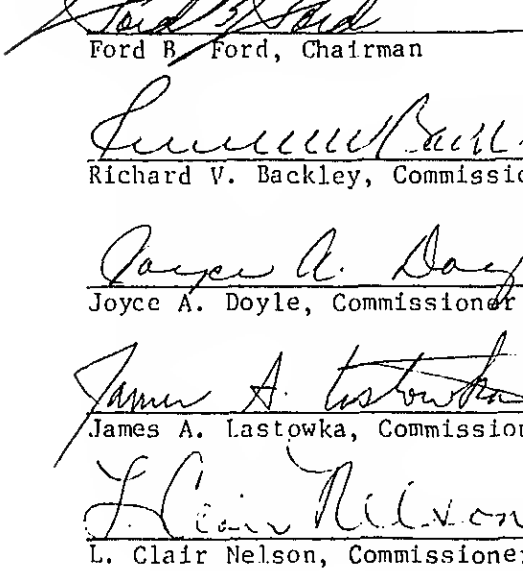
BY THE COMMISSION:

On June 16, 1986, Harry L. Wadding filed with the Commission a Motion to Have the Judgment Set Aside in the above matter. The decis of Commission Administrative Law Judge Gary Melick in this proceeding dismissing Mr. Wadding's discrimination complaint, was issued on June 18, 1985. 7 FMSHRC 896 (June 1985)(ALJ). Wadding failed to file a timely petition for discretionary review of Judge Melick's decision within the 30-day period prescribed by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). 30 U.S.C. § 823(d)(2)(A)(i). See also 29 C.F.R. § 2700.70(a). The Commission d not direct review on its own motion, and by operation of the statute judge's decision became a final decision of the Commission 40 days af its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we construe Wadding's motion as a request for relief from a final Commis order. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply absence of applicable Commission rule); Fed. R. Civ. P. 60 (Relief fr Judgment or Order). See William A. Haro v. Magma Copper Co., 5 FMSHR 9-10 (January 1983); Gerald D. Boone v. Rebel Coal Co., 4 FMSHRC 1232 1233 (July 1982).

judge's decision. The motion is denied for two reasons.

First, the motion is seriously untimely. A Rule 60 motion based allegations of fraud "shall be made within a reasonable time, and .. not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b) (emphasis added). Although Wadding's motion falls within the one-year period, we do not find the lapse of time between the issuance of the judge's decision and the submission of his motion to be reasonable under the circumstances. Wadding's motion is not based on newly discovered material evidence, rather on evidence and allegations pertaining to the merits of his discrimination complaint and contested at the hearing below. There no apparent reason why Wadding could not have filed a timely petition for discretionary review challenging the judge's findings and credib resolutions with respect to the matters that he now seeks to raise. Rule 60 is not a substitute for appeal, and under settled principles finality and repose the present motion is untimely. See, e.g., Cent Operating Co. v. Utility Wkrs. of America, 491 F.2d 245, 252-53 (4th Cir. 1974); 11 Wright & Miller, Federal Practice and Procedure § 286 (p. 232) (1973).

Second, even were the motion to be entertained as timely, it is insufficient on the merits to justify relief. A movant under Rule 60(b)(3) must establish by clear and convincing evidence that the adverse party engaged in fraud or other misconduct, and that the wrongdoing prevented the moving party from fully and fairly presenti his case. E.g., Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th 1978). Wadding has made no such showing but rather, as noted, merel attempts to relitigate evidentiary matters and assertions ruled upon the judge. We also observe that Wadding was represented by counsel the hearing below. We find no clear and convincing evidence of frau misconduct or illegality on this record.


Ford B. Ford, Chairman

Richard V. Backley, Commissio

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissio

L. Clair Nelson, Commissione

R. Henry Moore, Esq.
Rose, Schmidt, Chapman, Duff & Hasley
900 Oliver Bldg.
Pittsburgh, Pennsylvania 15222

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. : Docket No. CENT 84-91

AMAX CHEMICAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson
Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Feder
Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)
Administrative Law Judge Gary Melick concluded that Amax Chem
("Amax") violated 30 C.F.R. § 57.3-22 (1984) by failing to pr
adequate support for loose ground (roof). 1/ 7 FMSHRC 447 (M
(ALJ). We granted Amax's petition for discretionary review a
oral argument. On the bases that follow, we affirm.

1/ This mandatory ground control safety standard, which app
metal-nonmetal underground mines, provides:

> Miners shall examine and test the back, face, and r
> of their working places at the beginning of each shift a
> frequently thereafter. Supervisors shall examine the gr
> conditions during daily visits to insure that proper tes
> and ground control practices are being followed. Loose
> shall be taken down or adequately supported before any o
> work is done. Ground conditions along haulageways and
> travelways shall be examined periodically and scaled or
> supported as necessary.

30 C.F.R.§ 57.3-22 (1984) (emphasis added). In 1985, this pr
as renumbered as 30 C.F.R. § 57.3022 but its wording was not

Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of Amax's mine. In the shuttle car unloading area Inspector Bays observed an area of roof 15-feet by 8-feet in whic a crack or separation was visible. Eight to ten roof bolts had been installed around the visible crack. Inspector Bays proceeded to sound the roof with his hammer. The inspector testified that when a solid roof is sounded a clear ringing sound is generally produced but that i there is "some separation in the strata" of the immediate roof a dull, "drummy" sound is heard. Tr. 27-28. 3/ When Inspector Bays sounded t area in question, he encountered a drummy, "dull thud" sound. Because of the presence of the visible crack and the results of his sounding test, the inspector believed that the roof was loose and inadequately supported and issued the subject citation alleging a violation of section 57.3-22. The inspector designated the alleged roof control violation as "significant and substantial." 30 U.S.C. § 814(d)(1).

The citation was terminated after Amax installed six additional roof bolts in the cited area. After installation of those bolts, Inspector Bays again tested the roof and found that it no longer sound drummy.

At the hearing before Judge Melick, Amax's general mine superinte Robert Kirby, acknowledged that a drummy sound suggests that there is separation at some point above the ceiling. He stated, however, that this does not necessarily mean that the material is loose and will fal Kirby testified that the practice at Amax was to install roof bolts in drummy-sounding areas as insurance against roof falls. Kirby conceded on cross-examination that, despite his past experience in the mine, he unable to determine with absolute certainty whether a drummy area will fall. S.K. Desai, Amax's production superintendent, testified that drummy-sounding roof is evidence of either a physical separation in th roof strata or loosened adhesion between the strata because of the presence of carnallite or mud seams. Desai testified that when carnal comes in contact with salt it will produce a drummy sound when tapped. He further stated that the presence of carnallite poses the same hazar as separation in the seams and the material could fall.

2/ Carnallite is a massive, granular, greasy, milk-white, soluble, hydrous magnesium-potassium chloride. Bureau of Mines, U.S. Departmen of Interior, A Dictionary of Mining, Mineral and Related Terms 177 (1968) ("DMMRT").

3/ Drummy is defined as, "[l]oose coal or rock that produces a hollo loose open weak, or dan erous sound when ta ped with an hard substa

between the strata resulting from the presence of carnallite or mud seams." 7 FMSHRC at 449. The judge determined that even using Amax's "definition of 'loose' as 'not rigidly fastened, or securely attached' or as 'loosely cemented ... material,'" the cited drummy roof was loose and required additional support. 7 FMSHRC at 449. Accordingly, the judge found a violation. He further concluded that the evidence was insufficient to establish a "significant and substantial" violation within the meaning of section 104(d)(1) of the Act, as no effort had been made by the MSHA inspector to bar down the area around the fractur 7 FMSHRC at 450. 4/ The judge assessed a $50.00 civil penalty.

We conclude that substantial evidence supports the judge's finding of a violation in this particular instance but, on the present record, we disavow any implication in the judge's decision that the presence of drummy-sounding roof (back) in a metal-nonmetal mine always signifies "loose" ground within the meaning of the standard.

Section 57.3-22 requires in pertinent part: "Loose ground shall b taken down or adequately supported before any other work is done." (Emphasis added). In light of the arguments advanced in this case, we emphasize at the outset that this standard does not provide that "drumm ground be taken down or adequately supported but rather requires that "loose ground" be taken down or supported. "Loose ground" is not defin in the standard, and we therefore turn to the commonly accepted meaning of the term.

Both the Secretary and Amax note that "loose" is defined as "not rigidly fastened or securely attached." Webster's Third World New International Dictionary (Unabridged) 1335 (1966). The term "loose ground" has a specific meaning within the mining industry and is define as "[b]roken, fragmented, or loosely cemented bedrock material that tends to slough from sidewalls into a borehole. ... As used by miners, rock that must be barred down to make an underground workplace safe.... DMMRT 658. Accordingly, the term loose ground, as used in this standar refers generally to material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling.

While this definition is generally useful, the crux of the matter is how it is determined that ground is, in fact, loose within the meani of section 57.3-22. As discussed in recognized texts, practical roof testing is not yet a precise science served by a sophisticated technolo

4/ The Secretar did not seek review of the judge's f nding that the

Generally, loose roof will give off a dull, hollow, drummy sound as compared with the solid ring of firm roof. While a drummy sound is generally an indication of loose roof, circumstances may be present i which the sound-and-vibration test is not reliable. See, e.g., Cassi id., at 77. We note the concession of Inspector Bays that there are instances when a drummy sound is produced during testing but the roof not, in fact, loose. Tr. 64-65.

In this regard, it bears emphasis that Amax's mine is a potash mine. Unlike the regulatory scheme that obtains with respect to unde ground coal mines, approved roof control plans are not required in underground metal-nonmetal mining operations. Rather, "[g]round supp shall be used if the operating experience of the mine, or any particu area of the mine, indicates that it is required." (30 C.F.R. §57.302 (1985) (formerly numbered as 30 C.F.R. § 57.3-20 (1984)). See genera White Pine Copper Div., Copper Range Co., 5 FMSHRC 825, 835-37 (May 1983). (Of course, the standard involved in the present case also imposes the continuing duty to examine ground conditions in such mine and to take down or adequately support any loose ground.)

In view of the distinctive nature of ground control in metal-nonmetal mines and the uncertainties that may be involved in any particular sound-and-vibration test, and on the basis of the present record, a per se rule equating drumminess with loose ground in under-ground metal-nonmetal mines cannot be endorsed. Rather, we hold that evaluating ground conditions and the adequacy of support under this standard, all relevant factors and circumstances must be taken into account. The result of a sounding test is an important factor, but t not necessarily dispositive. The size of the drummy area and other possible explanations for the drumminess must also be considered. Visible fractures, sloughed material, "popping" and "snapping" sounds the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas, are also relev factors to be considered. Cf. White Pine, supra, 5 FMSHRC at 833-37.

In the present case, we conclude that substantial evidence, whic includes but is not limited to the inspector's sounding test, support the judge's finding that the cited ground was loose. Here, the inspe carefully examined the area of roof in question. His attention was engaged first by the presence of a clearly visible crack surrounded b 8 to 10 previously installed roof bolts. A fracture often signifies roof, and Amax's previous bolting efforts indicated some level of cor by the operator itself. As noted, the inspector's sound test produce drummy sound despite the existing bolting. The testimony of producti superintendent Desai regarding ground conditions in Amax's mine lends

between the strata because of the presence of carnallite or mud seams
Desai also testified that carnallite poses the same hazard as does
separation in the seams. Although Amax correctly contends that its
operating experience must also he considered, we discern no persuasiv
reason on this record to challenge the inspector's informed judgment
to overturn the judge's finding that the roof was loose. 5/

5/ We reject any suggestion that the ground control measures require
by the standard apply only when ground is in immediate danger of falli
The standard contains no such qualification. If an operator disagrees
with an inspector's determination that the ground is loose, it can
attempt to demonstrate the soundness of the ground by barring the area
in question. Tr. 68. The operator also can point to the operating
history of the mine and any other relevant factors tending to show tha
the ground is not loose. Here, rather than barring the area in questi
Amax installed additional roof bolts. However, as the facts of this
case show the fact that roof bolts have previously been installed does
not guarantee compliance with the standard. The standard requires not
just supp r b t adequate support

On the foregoing bases, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissi

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissio

L. Clair Nelson, Commissione

Charles C. High, Jr., Esq.
Kemp, Smith, Duncan & Hammond
P.O. Drawer 2800
El Paso, Texas 79999

James L. Dow, Esq.
Dow, Feezer & Williams, P.A.
P.O. Box 128
Carlsbad, New Mexico 88221

Linda Leasure, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 86-217
v.	:	Citation No. 2692281;
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rushton Mine

DECISION

Appearances: Timothy M. Biddle, Esq., and Susan E. Chet Esq., Crowell & Moring, Washington, D.C., Contestant;
Robert A. Cohen, Esq., Office of the Solic U.S. Department of Labor, Arlington, Virgi for Respondent.

Before: Judge Maurer

This case is before me upon the notice of contest an motion to expedite filed by the Rushton Mining Company (Rushton) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act and Commission Rule 52, 29 C.F.R. § 2700.52, challenging validity of Citation No. 2692281 issued pursuant to secti 104(a) of the Act. A hearing was held in Pittsburgh, Pen sylvania, on July 3, 1986.

The issue in this case is whether a violation of the mandatory standard at 30 C.F.R. § 75.1400(c) existed as alleged in Citation No. 2692281. The citation, as modifi reads as follows:

> The devices used to transport persons in the slope [do] not provide assurance they will act quickly and effectively in the event of an emergency in that the Sanford-Day Brakecar is the trailing car when entering the slope and the lead car when exiting the slope. [S]hould uncoupling take place the Sanford-Day Brakecar could not control or stop the other mantrip car used in conjunction with the brakecar.

act quickly and effectively in an emergency. Such catches or devices shall be tested at least once every two months.

Rushton has filed a post-hearing motion to supplement the record to offer into evidence the affidavit of Raymond C Roeder, Mine Manager of the Rushton Mine (marked as Exhibit C-7) and the affidavit of Gerald P. Scanlon, Resident Mining Engineer of the Rushton Mine (marked as Exhibit C-8). The stated purpose of these two exhibits is to supplement Rushton's evidence concerning the likelihood of a failure in the coupling between the brakecar and mancar, which question is at issue in this case. These exhibits contain technical analyses of the coupling strength between the brakecar and the mancar, as well as the loads the various components are subjected to, which are clearly relevant, at least insofar as they concern the equipment as it existed on the day the citation was written, June 23, 1986. The Secretary objects to these submissions on the grounds that they go beyond the scope of the testimony adduced at the hearing and obviously do not provide an opportunity for cross-examination. Considering the proffered exhibits in their entirety, I agree. However, I am going to admit Exhibits C-7 and C-8 into evidence for the very limited purpose of clarifying certain estimates that were made on the record at the hearing and which are applicable to the equipment as it existed on June 23, 1986. These estimates were subject to cross-examination at the hearing and I see no reason not to admit the more correct data into evidence if the party sponsoring it has taken the trouble to refine it. In each case the estimate which is in the hearing record and the later computation are relatively close and the raw data is available for anyone to verify or differ with the mathematical computations.

Findings of Fact

1. Access into and out of the Rushton Mine is via a 16 degree slope approximately 700 feet in length beginning at the surface.

2. In its existing configuration, there is a hoist with a one-inch diameter steel cable rated to hold approximately fifty tons dead weight attached to a brakecar which is in turn coupled to a mancar on a supplementary track

it is used at the beginning and end of each shift, of whic there are three, to take the full complement of miners int and out of the mine.

4. Normal procedure is for the mancar to be discon- nected from the brakecar during the shift and left on a si track on the surface. The brakecar remains attached to th hoist rope and a supply car is coupled to the brakecar to make up a "supply-trip."

5. The brakecar is only detached from the hoist rope when the cable is changed, which is approximately every 4 to 6 months and on those occasions when heavy equipment is moved into or out of the mine.

6. Attaching the hoist rope to either the brakecar as is presently done or the mancar as is proposed by MSHA, requires a relatively complex (compared to the brakecar- mancar attachment) multi-step connection process which tak two men to accomplish because the coupling assembly weighs 177 pounds.

7. The brakecar contains a braking system which can be activated either manually by a person seated in the front seat of the car or automatically if either of two centrifugal switches senses an overspeed condition which would occur when the brakecar reaches a speed of approxima 300 feet per minute. The hoist normally runs at 100 feet per minute when hoisting people in the mantrip. In the event of an overspeed condition, such as would be caused by a hoist rope break, the brakes would automatically stop the brakecar and the coupled mancar.

8. These brakes are tested in the slope at least monthly and when tested together with the mancar, the brakes have performed properly, holding both the brakecar and the mancar.

9. The mancar is connected to the down-slope end of the brakecar by means of a steel drawbar that is 23 inches long, from 6 to 5-1/4 inches wide and 1-1/4 inches thick. There are two three-inch holes in either end of this bar through which a 2-1/2 inch steel pin connects the drawbar to the mancar. A 2-1/4 inch steel pin connects the drawba to the brakecar by a coupling lever which obviates the

10. The steel drawbar assembly existent at the time the citation was written is estimated to be capable of withstanding a load of fifty tons. 1/ The safety chains, whose purpose is to keep the two cars connected in the even the drawbar or one of the pins should fail, can withstand eighteen tons of stress on each chain.

11. The brakecar weighs approximately 13,500 pounds and the mancar weighs 11,280 pounds. Thus, the total weight of the empty mantrip is 24,780 pounds. When fully loaded with 52 men (assuming 200 pounds per man), the mantrip will weigh an additional 10,400 pounds or approximatel 35,180 pounds total. When the fully loaded mantrip is on the 16-degree slope track, however, resolution of the force of gravity into two components determines that 72.5% of the total weight acts perpendicular to the surface of the slope and is absorbed by the slope track leaving only 27.5% or ap proximately 5 tons of dead weight acting parallel to the slope and pulling on the hoist rope that is capable of supporting fifty tons.

12. When fully loaded (at 200 pounds per man) the mancar weighs 17,680 pounds. On the 16 degree slope track, the perpendicular component of gravity again absorbs 72.5% of the total weight. Thus the actual weight drawing on the pin and drawbar coupling assembly between the cars is appro imately 5,000 pounds or 2.5 tons of dead weight pulling on a drawbar capable of supporting fifty tons.

13. The mantrip, in its existing configuration, was placed in service in late 1972. Since that time, the insta citation is the only one written by MSHA for the alleged failure of this equipment to meet the cited mandatory standard. In that time there has never been an accident involving the cable attachment or the coupling assembly between the cars. Nor have the brakes ever failed.

1/ Because the manufacturer could not define with certaint the steel characteristics of the existing drawbar and pins, Rushton has purchased a new drawbar and new pins. The load capacity of the new drawbar is 405,000 pounds or 202.5 tons

tion. The matter began to come to a head in April of 1986 when an MSHA inspection party visited the mine to observe hoist operations. At that time they requested that Rushto relocate the brakecar to place it inby the mancar, i.e., switch the cars around. When Rushton balked at doing this his "superiors" directed Inspector Reichenbach to issue the instant citation, which he did on June 23, 1986.

MSHA's concern over this configuration of the cars in the mantrip stems from the fact that the mancar has no independent braking system or anything else for that matte to stop it from running away down the slope should it become detached from the brakecar. While MSHA agrees that the coupling assembly, together with the two one-inch link safety chains appears to be a secure method of attaching the two cars, MSHA argues that in order to satisfy the cited regulation, the attachment must be permanent, or the mancar must be up-slope from the brakecar. Mr. Gossard, the chief witness for the Secretary at the hearing testified on direct examination at Tr. 59:

> Q. Now, the mantrip car and the braking car are attached by means of a link aligner?
>
> A. It's a pin and link arrangement, yes, sir.
>
> Q. Okay. And, safety chains?
>
> A. That's correct, bridle chains.
>
> Q. And, in order for the mantrip car to come unattached from the braking car, would both of those devices have to fail?
>
> A. Both devices, if they were both hooked up, initially, both devices would have to fail to cause a situation.
>
> Q. And, in your opinion could that situation occur?
>
> A. It may. I wouldn't want to bet thirty men' lives on that it wouldn't occur.

The key phrase in the above-quoted testimony is that "[i]

order to have the brakes on the brakecar satisfy the re
latory requirement for the mancar. It is not disputed
herein that the brakes on the brakecar would stop both
cars fully loaded should there be a hoist rope break or
other overspeed condition, as long as the two cars rema
attached. In fact, the preferred method of abatement c
this citation is to simply reverse the order of the car
putting the brakecar on the down-slope end. In that co
figuration per MSHA, the mancar would not require an in
dependent braking system, but rather the brakes on the
brakecar would suffice to handle the braking for both c

I conclude that the regulation does not require a
permanent brakecar-mancar attachment. On the contrary,
conclude that if these two cars are sufficiently tied
together, they are in fact operating as a single device
to transport persons in a slope and that device (i.e.,
mantrip) is equipped with an adequate automatic braking
system capable of stopping both cars in an emergency (s
as a hoist rope break).

Therefore, the ultimate issue is the adequacy of t
attachment between the mancar and the brakecar since ev
one appears to agree that so long as the mancar remains
coupled to the brakecar there is no hazard under any co
ceivable emergency situation. The possibility of brake
mancar uncoupling is the hazard the Secretary is concer
with.

The only empirical data or scientific evidence con
cerning the strength of the coupling assembly between t
two cars, including the safety chains, came from the co
testant and I find such evidence to be credible. The c
of that evidence was that the coupling assembly can wit
stand many times the maximum fully loaded weight of the
mancar. Likewise, the safety chains in the event that
the principal coupling did break would be sufficient, b
a safety factor of at least 8 (eight), to keep the manc
attached to the brakecar. This evidence was unrebutted
Also unrebutted was the fact that Rushton has 13 years
experience operating this mantrip in that configuration
without experiencing any separation of the cars or any
problem associated with the coupling or safety chains.

In his brief, the Secretary states that "[T]here i

either.

The clear preponderance of the relevant evidence in this record does not support the alleged violation. Accordingly, I find that there has been no violation of the cited standard.

ORDER

Citation No. 2692281 is VACATED and the contest is GRANTED.

Roy J. Maurer
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., and Susan E. Chetlin, Esq., Crowell & Moring, 1100 Connecticut Avenue, Washington, D.C. 20036 (Certified Mail)

Robert A. Cohen, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

ADMINISTRATION (MSHA), Petitioner	:	Docket No. CENT 85-36-M A.C. No. 39-00055-05539
v.	:	Homestake Mine
ESTAKE MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

fore: Judge Lasher

The parties have reached a settlement of the four violat volved in the total sum of $8,290.00. MSHA's initial assess nt therefor totaled $11,040.00.

The terms of the settlement are as follows:

Citation	Assessment	Settlement
2097234	$10,000.00	$8,000.00 (fatality)
2097564	1,000.00	250.00
2097965	20.00	20.00
2097966	20.00	20.00

This settlement is approved for the following reasons:

With respect to Citation No. 2097234, it appears that th rkman who had fallen to his death would have not have falle d he used a safety belt. While his foreman was aware he wa t utilizing the safety belt, nevertheless it appears he had en issued a safety belt by Respondent, and instructed as to ed and use of such. In view thereof, the 20% reduction fro e statutory maximum penalty ($10,000) appears justified and is compromise is approved. For the same reasons the reduce nalty for Citation No. 2097564 (failure to install a handra also approved.

I take notice from prior matters involving this Responde at, in terms of size, Respondent is a large gold mine opera also appears from the settlement motion that Respondent ab e violative conditions and demonstrated "a good faith desir mply with the health and safety standards in the future.

Citation Nos. 2097965 and 2097966 were not the subject of

e of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

tribution:

ehue C. Brunson, Esq., Office of the Solicitor, U.S. Depar
t of Labor, 911 Walnut Street, Room 2106, Kansas City, MO
06 (Certified Mail)

ert A. Amundson, Esq., Amundson, Fuller & Delaney, 203 W.
. Box 898, Lead, SD 57754 (Certified Mail)

Dallas Tinnell, United Steelworkers of America, 315 1/2 M
eet, Lead, SD 57754 (Certified Mail)

c

AUG 5 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 86-64-M A.C. No. 41-03281-05503
v.	:	Carter Pit
D. P. FROST CONSTRUCTION CO., Respondent	:	Docket No. CENT 86-65-M A.C. No. 41-02422-05519
	:	Docket No. CENT 86-66-M A.C. No. 41-02422-05520
	:	Yelverton Pit

ORDER APPROVING IN PART AND DENYING IN PART THE PROPOSED SETTLEMENT AGREEMENT

efore: Judge Broderick

On July 22 and August 4, 1986, the Secretary filed motio to approve settlement agreements in the above cases presently scheduled for hearing (with Docket No. CENT 86-29-M) on September 16, 1986.

Docket No. CENT 86-64-M contains three alleged violation riginally assessed at $689. The parties propose to settle f $297. Citation 2661194 charged a violation of 30 C.F.R. § 56.11027 because of a sagging work platform with two of eight welds separated. It was assessed at $168, and the parties propose to settle for $126 because the area in question is a metal walkway and if it sagged it would contact a flywheel located below it and the resulting sound would have warned of deteriorated condition of the platform/walkway. In my judgme he reduction in the penalty is not supported by the motion. Citation 2261195 charged a violation of 30 C.F.R. § 56.15005 because an employee was standing on a conveyor belt shovellir material and was not wearing a safety belt. No handrails wer he belt. It was originally assessed at $227 and the parties proposed to settle for $151 because "Defendant states this wa solated incident . . . there was little or no negligence in ed since the iolation could no have been reasonably

of $20 because Defendant states that this head pulley is 8'
oove the ground." Does the government accept this statement
f it is impossible to reach the pinch point, why was the
tation issued? The motion does not provide justification f
ne settlement. Therefore the motion is DENIED.

Docket No. CENT 86-65-M contains 20 alleged violations
riginally assessed at $1141. The parties propose to settle
804. Eleven of the violations were treated as "single penal
ssessments" and assessed at $20 each. The motion states tha
ne parties agree that the proposed penalties for these
iolations are appropriate. I concur. Citation 2662166 char
violation of 30 C.F.R. § 56.14008B because of a bench grind
ithout a tool rest. It was assessed at $79 and the motion
ates that the parties agree that the violation occurred and
oposed penalty was appropriate. I concur. Citation 26621
harged a violation of 30 C.F.R. § 56.12025 because of a loos
ound wire and improper fittings in the coarse conveyor box
as assessed at $63, and the parties agree that the violation
curred and the proposed penalty was appropriate. I concur.
itation 2661182 charging a violation of 30 C.F.R. § 56.1400
ecause of an unguarded tail pulley was assessed at $147. Th
arties propose to settle for $110 because the violation "was
er-evaluated by the inspector." This statement does not
stify the proposed reduction. With respect to citations
661183 (the violation was originally assessed at $105, the
roposed settlement is for $78), 2661187 (originally assessed
112; proposed settlement $20), 2662171 (originally assessed
79; proposed settlement $60), 2662175 (originally assessed a
79; proposed settlement $20), the motion provides justifica
r the proposed settlement, and I will approve it. With res
citations 2662169 (charging a violation of 30 C.F.R. §
6.12030 because of exposed electrical conductors and a leak
uel valve, originally assessed at $178; proposed settlement
134) and citation 2662176 (charging a violation of 30 C.F.R
6.11012 because of an open hole in the floor of the generat
railer, originally assessed at $79; proposed settlement $20
he motion does not justify the proposed settlement and I wi
ENY it.

Docket No. CENT 86-66-M contains three citations, two o
hich charged violations assessed as "single penalty
ssessments" at $20 each. The parties propose to settle the
iolations for the assessed amounts, and I will approve the
ettlement. Citation 2661186 charges a violation of 30 C.F.

The case will be called for hearing in Dallas, Texas commencing September 16, 1986 for all the alleged violati respect to which I have indicated that I will not approve proposed settlement agreement.

James A. Broderick
Administrative Law Judge

Distribution:

Jack Ostrander, Esq., U.S. Department of Labor, Office of Solicitor, 525 S. Griffin Street, Suite 501, Dallas, TX 7 (Certified Mail)

John Hawkins, Esq., Naman, Howell, Smith & Lee, Box 1470, TX 76703 (Certified Mail)

slk

AUG 5 1986

OLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 86-311-R
	:	Order No. 2711294; 4/16/86
ETARY OF LABOR,	:	
NE SAFETY AND HEALTH	:	Docket No. WEVA 86-312-R
MINISTRATION (MSHA),	:	Order No. 2711295; 4/16/86
Respondent	:	
	:	Docket No. WEVA 86-313-R
	:	Order No. 2711298; 4/16/86
	:	
	:	Blacksville No. 1 Mine

ORDER DISMISSING CONTESTS

re: Judge Koutras

The captioned cases were scheduled for hearing with ral other dockets heard in Morgantown, West Virginia, ng the term July 29 - 31, 1986. When the cases were ed, counsel for the parties advised me on the record that have reached an agreement which will enable me to dispose he cases without the necessity of hearings.

With regard to Docket No. WEVA 86-311-R, counsel advised hat the contested section 104(d)(2) order should be med as issued and that the contestant no longer desired ontest the order and would file a motion to withdraw its est.

With regard to Docket Nos. WEVA 86-312-R and WEVA 86-313-R sel advised me that MSHA has agreed to modify the contested ion 104(d)(2) orders to section 104(a) citations, with nificant and substantial" (S&S) findings. Under the cir- tances, contestant moved to withdraw the contests, and the est was granted.

George A. Koutras
Administrative Law Judge

Distribution:

W. Henry Lawrence, Esq., Steptoe and Johnson, P.O. Box 2190 Clarksburg, WV 26301 (Certified Mail)

Mark Swirsky, and William T. Salzer, Esqs., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

/fb

AUG 6 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CHARLES BALL, Complainant	:	DISCRIMINATION PROCEEDI
	:	Docket No. KENT 86-93-D
	:	MSHA Case No. BARB CD 8
	:	No. 37 Mine
v.	:	
ARCH OF KENTUCKY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged dis ination filed by the Secretary of Labor on behalf of Cha Ball against the respondent pursuant to section 105(c)(2 the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 et seq. The complaint alleges that on or about Ju 1985, the complainant was discriminated against and susp by the respondent because he had complained to the respo about safety violations and refused to continue to work certain alleged existing hazardous conditions. The matt scheduled for hearing in Duffield, Virginia, on August 2 1986.

On August 4, 1986, the parties filed a motion for m approval of a proposed settlement of the case. Counsel both parties, including the complainant Charles Ball, ha executed the proposed settlement, the terms of which are pertinent part as follows:

> 1. Respondent agrees to pay to Mr. Charles Ball wages in the amount of $534.20 representing wages he would have earned had he not been placed on suspension for 3 days without pay. In addition to this, respondent agrees to make appropriate

2. Respondent agrees to remove any references to any derogatory comments about the suspension of Mr. Ball on or about June 6, 1985, from Mr. Ball's personnel and company records.

3. In light of the difficulties and contingencies necessarily attendant to litigation of the subject case together with the complex factual disputes requiring many witnesses and the minimal nature of the economic loss to the complainant which will be entirely recompensed as a result of this settlement, the parties agree that the proposed settlement in this case is appropriate in consideration of all the circumstances.

4. The Secretary recognizes that satisfaction of the miner's interests is paramount to the imposition of a discrimination civil money penalty. The miner's interests in this case are well served by the settlement in which he recovers lost wages and has all adverse references to the circumstances involved in his suspension removed from his employment record. The Secretary agrees to waive the proposed discrimination civil penalty because such a waiver is necessary to achieve a prompt and favorable disposition of the miner's claim. The Secretary asserts that the respondent has no known history of previous violations of section 105(c) of the Act.

5. In consideration of the willingness of the respondent to resolve the claim quickly by payment of restitution to the complainant and the willingness of the respondent to take what other action is necessary to make the complainant whole, the Secretary agrees to waive imposition of any civil penalty. The sum being advanced by the respondent to the benefit of the miner is such that all purposes which would be served by a civil penalty assessment in this case are satisfied. Since section 105(c) of the Act is uniquely designed to benefit individual miners

6. It is the parties' belief that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.

7. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

Conclusion

After careful review and consideration of the settlemer terms and conditions executed by the parties in this proceed ing, including Mr. Ball, I conclude and find that it reflect a reasonable resolution of the complaint filed by MSHA on Mr. Ball's behalf. Since it seems clear to me that all part are in accord with the agreed upon disposition of the compla I see no reason why it should not be approved.

ORDER

The proposed settlement IS APPROVED. Respondent IS ORDERED AND DIRECTED to fully comply forthwith with the ter of the agreement. Upon full and complete compliance with t terms of the agreement, this matter is dismissed. The scheduled hearing is cancelled.

George A. Koutras
Administrative Law Judge

Distribution:

Theresa Ball, Esq., Office of the Solicitor, U.S. Departmen Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 372 (Certified Mail)

H. Juanita M. Littlejohn, Esq., Arch of Kentucky, Inc., 200 North Broadway, St. Louis, MO 63102 (Certified Mail)

/fb

AUG 6 1986

TUNNELTON MINING COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	CONTEST PROCEEDINGS Docket No. PENN 86-65-R Citation No. 2696550; 1 Docket No. PENN 86-66-R Citation No. 2696551; 1 Docket No. PENN 86-67-R Citation No. 2696552; 1 Docket No. PENN 86-68-R Citation No. 2696554; 1 Docket No. PENN 86-69-R Citation No. 2696555; 1 Docket No. PENN 86-70-R Citation No. 2696556; 1 Docket No. PENN 86-71-R Citation No. 2696557; Docket No. PENN 86-108 Citation No. 2696464; Docket No. PENN 86-111 Citation No. 2696473; Marion Mine

ORDER OF DISMISSAL

Before: Judge Koutras

These proceedings concern notices of contests file
the Contestant Tunnelton Mining Company pursuant to sec
105(d) of the Federal Mine Safety and Health Act of 197
challenging the validity of nine section 104(a) non-"S&

discharging foam to certain electrical components used i
junction with certain belt conveyor drives at different
tions in the mine.

Tunnelton filed a motion for summary decision and r
expedited consideration in light of the abatement deadli
imposed by MSHA. The abatement times were extended by M
extensions were also granted for the purpose of permitti
to file its responses to the request for summary decisio
Subsequently, the parties resolved the dispute and MSHA
to accept Tunnelton's alternative means of compliance wi
mandatory safety standard in issue. At the same time, M
vacated the contested citations, and the parties are now
agreement that these contests may be dismissed.

ORDER

In view of the fact that the disputed citations hav
been vacated, and with the agreement of the parties, the
contests ARE DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., Crowell & Moring, 1100 Connecti
Avenue, N.W., Washington, DC 20036 (Certified Mail)

Joseph T. Kosek, Esq., Pennsylvania Mines Corporation, P
Box 367, Ebensburg, PA 15931 (Certified Mail)

Covette Rooney, Esq., Office of the Solicitor, U.S. Depa
of Labor, Room 14480 Gateway Building, 3535 Market Stree
Philadelphia, PA 19104 (Certified Mail)

/fb

AUG 6 1986

GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 86-135-
	:	Order No. 2689830-02;
v.	:	
	:	Docket No. PENN 86-136-
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 2689831-02;
	:	
	:	Docket No. PENN 86-137-
	:	Order No. 2689832-02;
	:	
	:	Docket No. PENN 86-138-
	:	Order No. 2689833-02;
	:	
	:	Docket No. PENN 86-139-
	:	Order No. 2689834-02;
	:	
	:	Docket No. PENN 86-140-
	:	Order No. 2689835-02;
	:	
	:	Docket No. PENN 86-141-
	:	Order No. 2689837-01;
	:	
	:	Docket No. PENN 86-142
	:	Order No. 2689838-01;
	:	
	:	Docket No. PENN 86-143
	:	Order No. 2689839-01;
	:	
	:	Docket No. PENN 86-144
	:	Order No. 2689840-02;
	:	
	:	Docket No. PENN 86-145
	:	Order No. 2689884-01;
	:	
	:	Docket No. PENN 86-146
	:	Order No. 2689885-02;
	:	
	:	Docket No. PENN 86-147
	:	Order No. 2689886-02;

:
: Docket No. PENN 86-150-R
: Order No. 2689891-01; 3/31/
:
: Docket No. PENN 86-151-R
: Order No. 2689892-01; 3/31/
:
: Docket No. PENN 86-152-R
: Order No. 2689893-01; 3/31/
:
: Docket No. PENN 86-153-R
: Order No. 2689894-01; 3/31/
:
: Docket No. PENN 86-154-R
: Order No. 2689895-02; 3/31/
:
: Docket No. PENN 86-155-R
: Order No. 2690021-02; 3/31/
:
: Greenwich No. 2 Mine

ORDER OF DISMISSAL

efore: Judge Koutras

These proceedings concern Notices of Contests filed by ntestant pursuant to section 105(d) of the Federal Mine Sa nd Health Act of 1977, challenging the legality of 21 secti 04(d)(2) orders issued by MSHA inspectors for alleged viola f the training requirements found in 30 C.F.R. § 48.6. The rders were issued because of the alleged failure by the con nt to train newly employed experienced miners. The alleged iolations were originally issued as section 104(a) citation ut were subsequently modified by MSHA to section 104(d)(2) rders after an MSHA "manager's conference."

The contestant raised several defenses to the issuance he orders, including claims that they were not issued promp s required by section 104(d)(2), and that they were not iss s a result of any inspection as required by that section. ases were scheduled for hearing in Indiana, Pennsylvania, d ng the term August 5-7, 1986, but the hearings were continu fter the parties informed me of a possible settlement of th ispute. As a result of further conferences by the parties,

modification of the contested orders, the parties agree tha
these contests may now be dismissed.

ORDER

In view of the foregoing, the Notices of Contest filed
the contestant in these dockets ARE DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Joseph T. Kosek, Esq., Greenwich Collieries, P.O. Box 367,
Ebensburg, PA 15931 (Certified Mail)

Deborah A. Persico, Esq., Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Arlington, VA 2
(Certified Mail)

/fb

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEVA 85-169
	:	A.C. No. 46-02493-0353
v.	:	Quinland No. 1 Mine
QUINLAND COALS, INC., Respondent	:	

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solic
U.S. Department of Labor, Arlington, VA, fo
Petitioner;
William D. Stover, Esq., Quinland Coals, In
Beckley, WV, for Respondent

Before: Judge Fauver

The Secretary of Labor brought this action for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Having considered the hearing evidence and the record as a whole I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACTS

1. Respondent's Quinland No. 1 Mine was formerly ow operated by Westmoreland Coal Company under the name of Ferrell Mine.

1/ Respondent's Objection to Acceptance of Posthearing E is rejected. The preshift reports of Dayton Lane are the evidence of the reports filed by Lane. They are received evidence in this proceeding. Respondent's Motion for a Protective Order is moot, because no other preshift repor of Lane were submitted by the Secretary after such motion and before entry of this Decision.

explosion area from the active workings. The atmosphere
the area behind the seals consists of a high level of met
and a low level of oxygen. This is desirable because an
explosive concentration of methane is between five and
fifteen percent. That is, if methane is above 15 percent
or below five percent, it is scientifically considered to
nonexplosive. If the oxygen level is kept below sixteen
percent, it is also scientifically considered that there
will not be enough oxygen for combustion. It is importar
for the seals to operate effectively to prevent the atmos
behind them from leaking out into the active workings, si
the high methane and low oxygen content would present a
serious hazard to persons in the active workings.

3. As a result of the 1980 accident, the mine was
designated by MSHA to receive a spot inspection every fiv
days pursuant to § 103(i) of the Act. In a spot inspecti
an inspector takes samples of the atmosphere behind the
seals, checks the seals to make sure that they are not
leaking or being crushed and that the roof conditions are
adequate, and tests to be sure the methane is staying beh
the seals.

4. On October 11, 1984, Inspector Ernest Thompson m
a spot inspection of Respondent's mine under § 103(i). I
the Main East area he took samples of the atmosphere from
behind the seals. At the No. 7 seal he observed a large
roof fall in the entry, which he described as follows in
his testimony at the hearing:

> There was cribs at the end of the falls. They had
> all the weight they could stand. They were crushing
> There was eight or ten posts broke in the center of
> the entry. The top was broke all to pieces, and I
> could hear the gas hissing out of the top coming
> through the cracks in the top (Tr. 24).

* * * *

> Their top had dropped down. Part of the top dropped down approximately an inch from the remainder. The roof, in my opinion, had already fallen. It wasn't on the mine floor. It was leaning on what supports they had in there and the seal. It was crushing out the seal (Tr. 26).

Inspector Thompson also observed that the broken posts ha not been replaced. In his opinion, the condition had bee in existence for some time because the broken posts had a lot of dust on them, leading him to believe that they h been broken for at least a month to two months. The roof site was an active working place where preshift examiners and other workers were required to go on a regular basis. Inspector Thompson found an inadequate roof condition, and issued § 104(d)(1) order (No. 2144040) charging a violation of 30 C.F.R. § 75.200, alleging that this was a significant and substantial violation, that negligence wa high, and that the violation was reasonably likely to res in a fatal injury.

5. On the same day Inspector Thompson issued § 104(Order No. 2144047, alleging a violation of 30 C.F.R. § 75.303, as follows:

> The preshift examination made by Dayton Lane on 10/10 and 10/11/84 for No. 7 seal in Main East area was inadequate in that No. 7 seal was leaking excessively (more than 5% methane was detected) and the mine roof was inadequately supported and Mr. Lane certified this area to be clear.

Inspector Thompson testified that he tested the air for m about six feet from the No. 7 seal and detected methane i area. He took a bottle sample which, when analyzed, show methane level of 5.64 and oxygen level of 19.21 (Ex. G-9) This was an explosive level of methane and a low level of oxygen.

6. The preshift examiner, Dayton Lane, had certifi the area to be clear during the examination he conducted between 5:00 and 7:50 a.m. on October 11, 1984 (Ex. G-15

The cited standard, 30 CFR § 75.200, requires, in part, that "the roof and ribs of all active underground roadways, travelways, and working places be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." I credit Inspector Thompson's testimony as to the roof conditions and find that the roof support in the No. 7 seal entry was inadequate to protect persons from roof falls. There were broken timbers that had not been replaced contrary to Respondent's roof control plan. The roof was breaking or damaging the seal, and methane was leaking into the active working area. This was a dangerous condition.

Respondent was negligent in allowing this violation to exist. Dust on the broken posts indicated that the conditi had been in existence for a long time. In addition, Respon witness McClure testified that the condition of broken timbers was longstanding, having been in existence when he started work there in August of 1984. Although McClure was of the opinion that the unbroken timbers and cribs provided adequate roof support, he was aware that the roof control plan required that broken timbers be replaced and that ther were some broken timbers that had not been replaced as of October 11, 1984.

The Preshift Examination Cited in Order No. 2144047

The cited standard, 30 CFR § 75.303, requires that within three hours immediately preceding the beginning of any shift a certified person examine all active workings of the mine, examine seals to determine whether they are funct properly, and examine active roadways, travelways and appro to abandoned areas. Dayton Lane testified that he was the certified person responsible for conducting the preshift examination of the Main East seals on October 11, 1984. He conducted a preshift examination between 5:00 and 5:45 a.m. Although he was aware of the broken timbers, roof fall, and cracks in the roof in the area of the No. 7 seal, he did no report these conditions in his preshift report. Instead, h noted "clear" in the preshift mine examiner's book for that day (Ex. G-15, p. 4). It was his opinion that the roof was adequately supported.

report. It was a violation of § 75.303 to fail to report this condition.

However, the methane hazard found by Inspector Thomps does not establish a violation of the preshift examination requirements cited in Order No. 2144047. As noted above, the preshift examiner is required to examine seals to determine whether they are functioning properly. This wou include examining them to make sure they are not leaking methane. Inspector Thompson heard a hissing sound from th cracks in the roof above the seal. This fact, when combin with the high methane reading obtained from the methane detector and bottle sample, establishes that methane was leaking at the time Inspector Thompson was there. However methane leakage was not a constant condition, and there is no proof that there was methane leakage at the time of Lan preshift examination.

Lane testified that he tested for methane at the No. seal and found none, and he did not hear hissing in that area. There is no evidence that conditions were otherwise when he made his inspection.

The Test of a Significant and Substantial Violation

In Secretary of Labor v. Consolidation Coal Company, FMSHRC 189 (1984), the Commission held that the Secretary must prove the following elements to establish that a viol of a safety standard is significant and substantial: (1) the violation of a safety standard; (2) a discrete safety hazard, that is, a measure of danger contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.

seven) regularly went into this area, there was a reasonable likelihood that one of them would be injured if a roof fall occurred. The type of injury which could result, of course could be a fatality. Also, the roof conditions were allowing methane to escape. This could result in an explosion or, if a person were present when a large quantity of gas was escaping, he or she could be killed as a result of low oxygen.

The practice cited in one part of Order No. 2144047, i.e., failing to conduct an adequate preshift inspection of the roof, created a serious hazard. The purpose of the preshift examination is to detect and report hazardous conditions, so that corrective measures can be taken. The failure to report the dangerous roof condition could have significantly and substantially contributed to a serious mine accident.

However, the second part of Order No. 2144047, the failure to report leaking methane, was not proved by a preponderance of the evidence.

Respondent is a large operator. At the time of the inspection, Quinland Mine No. 1 was produing about 800,000 tons of coal a year and employed about 150 employees.

Considering all of the criteria of section 110(i) of the Act a civil penalty of $850 is ASSESSED for the roof violation (30 C.F.R. § 75.200).

Considering all of the criteria of section 110(i) of the Act, a civil penalty of $450 is ASSESSED for the preshift examination violation (30 C.F.R. § 75.303). This penalty is reduced from the Secretary's proposal of $900 because of the failure to prove the part of the charge concerning failure to report a methane hazard in the preshift report.

CONCLUSIONS OF LAW

1. The Commission's administrative law judge has jurisdiction in this proceeding.

3. Respondent violated 30 C.F.R. § 75.303 on October 1984, as charged in that part of Order No. 2144047 pertain a roof hazard, but the Secretary did not meet his burden proving a violation as to the part alleging a failure to ort a methane hazard.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the ve-assessed civil penalties in the total amount of $1,300 hin 30 days of this Decision.

William Fauver
Administrative Law Judge

ribution:

la K. Cronan, Esq., Office of the Solicitor, U.S. Departme Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified l)

liam D. Stover, Esq., Quinland Coals, Inc., 41 Eagles d, Beckley, WV 25801 (Certified Mail)

	:	Docket No. WEST 86-126-R
v.	:	Citation No. 2834575; 4/15/
	:	
ECRETARY OF LABOR,	:	Deer Creek Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
and	:	
NITED MINE WORKERS OF AMERICA,	:	
(UMWA),	:	
Intervenor	:	

DECISION

ppearances: John A. Macleod, Esq., and Ellen Moran, Esq., Crowell & Moring, Washington, D.C., for Contestant; Edward Fitch, Esq., Office of the Solicitor, U. Department of Labor, Arlington, Virginia, for Respondent; Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Intervenor.

efore: Judge Morris

This is a contest proceedings initiated by contestant Em ining Corporation pursuant to § 105(d) of the Federal Mine afety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the mery has contested a citation issued under § 104(a) of the A y the Mine Safety and Health Administration, (MSHA), on Apri 5, 1986.

The citation alleged Emery violated § 103(f) of the Act efusing to permit an international representative of the Uni ine Workers of America (Intervenor UMWA) to accompany an MSH nspector on a regular inspection of Emery's Deer Creek mine.

Emery, in its notice of contest, asserts that it did not iolate § 103(f) of the Act because it permitted a representa uthorized by his miners to accompany the inspector. Further mery permitted the UMWA representative (Mr. Rabbitt) to ccompany the inspector subject to his compliance with Emery' olicy at the mine. Emery's policy requires that a written otice be given at least 24 hours before the UMWA representat

Waiver of Liability

Thc undersigned, in consideration of being allowed to com upon the Deer Creek mine property (insert name of min hereby forever releases, discharges and waives as to Emer Mining Corporation ("Emery"), any and all claims rights o causes of action that the undersigned now has or may here after acquire against Emery on account of any damages sus tained or injuries suffered, presently or hereafter, whil present upon or within the mine property. The undersigne further agrees to hold Emery harmless on account of any a all liability which may attach to Emery on account of damages sustained or injuries suffered by the undersigned while upon or within the mine property. All references t Emery shall include its officers, directors, shareholders employees and agents.

Emery, in its notice of contest, asserts that Mr. Rabbitt ed to comply with Emery's notice and waiver requirements. MSHA supported Mr. Rabbitt and issued a citation Emery itted Mr. Rabbitt to enter the mine without signing the re ed release form.

In its contest seeking to vacate this citation Emery insi its requirements are reasonable and prudent; further, Eme rts it did not violate § 103(f), the statutory grant of wa nd rights.

Section 103(f) of the Act, 30 U.S.C. § 813(f), the statut ision in issue here, provides as follows:

> Subject to regulations issued by the Secretary, a re- presentative of the operator and a representative auth ized by his miners shall be given an opportunity to ac company the Secretary or his authorized representative during the physical inspection of any coal or other mi made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participa in pre- or post-inspection conferences held at the min Where there is no authorized miner representative, the Secretary or his authorized representative shall consu with a reasonable number of miners concerning matters health and safety in such mine. Such representative c

presentative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, on one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

The Hearing

A hearing on the merits commenced in Denver, Colorado on M 1986. The evidence was essentially credible and uncontroted.

The Secretary's Evidence

Vern Boston, an MSHA inspector for eight years, was the so ess called by the Secretary.

Inspector Boston, a person experienced in mining, has been tioned in the Orangeville, Utah MSHA office for the last two rs (Tr. 30, 31).

On April 15, 1986 the inspector met Mr. Rabbitt at the min . Boston knew Rabbitt by reputation, but he didn't know if bitt had ever previously been in the Deer Creek mine. Rabbi roduced himself as the International Representative of the A. The inspector knew Rabbitt had been in Utah for sometime two men agreed that Rabbitt would travel with the inspector ng the inspection (Tr. 32-35, 52). Dixon Peacock, a resentative of Emery's safety department who frequently acpanied the inspector, concurred.

After changing clothes the inspector entered the company ety department. Mr. White, the Deer Creek mine manager [1]/, ed he had a problem with Rabbitt accompanying the inspector White recognized Rabbitt as a member of the International lth and Safety Department of the UMWA but he did not believe bitt was a representative of the miners because he was not a loyee of the mine. Also the company had its own miner repre ative on the property. In addition, he had come on the perty without giving any advance notice (Tr. 32-38).

ector added the waiver allegation to the prior citation. 2/
bbitt did not sign the waiver and Emery abated the citation
rmitting Rabbitt to accompany the inspector (Tr. 33-42, 61)
ston believed it was clear to White that if he did not perm
bbitt to enter the mine without signing the waiver the in-
ector would issue a closure order. But it was not clear to
spector at the time whether White knew that the closure ord
ld be a "no-area affected order" 3/ (Tr. 63).

This was a AAA inspection. It was not an inspection und
ction 103(g) of the Act. Rabbitt was not abrasive and acte
orderly manner (Tr. 45, 51). Boston had been instructed t
ternational representatives are miners' representatives (Tr
.

After the inspection the inspector decided he was not
tisfied with the wording of the original citation, so he vo
e original and issued a new citation No. 2834575 (Tr. 34-44
64-67; Gov't. Ex. 5).

A "no area affected order" arises from the Secretary's
terpretative bulletin published in F.R. Vol. 43, No. 80 Apr
1978 and contained in Government Exhibit 4. It provides
rt as follows:

> It should be noted that section 104(b) of the Act provid
> for issuance of withdrawal orders if an inspector finds
> a violation described in a citation has not been abated.
> Pursuant to the requirements of section 104(b), orders u
> that provision will be issued in cases where there has b
> a failure to abate violations of section 103(f). Howeve
> actual withdrawal of miners will not ordinarily occur in
> cases arising under section 103(f), because section 104(
> also requires the inspector to determine the extent of t
> area of the mine affected by the violation. In most cas
> the area(s) of the mine affected by an operator's refusa
> permit participation or to compensate the representative
> under section 103(f) would be a matter of conjecture and
> could not be determined sufficient specificity. However
> cases may arise where a particular condition or situatio
> in the opinion of the inspector, cannot be adequately ev
> ated in the absence of a representative of miners. In s
> cases, the area affected by a refusal to permit partici-
> pation could be determined, and physical withdrawal of

representative of the miners.

In the inspector's opinion Rabbitt did not have skills, talent or knowledge of the mine that would ca inspection to be any different from what it would hav without him (Tr. 55). Further, management representa not aid the inspector. But generally speaking, miner sentatives and company representatives assist the ins performing broader, more comprehensive and more compl spections (Tr. 68).

Boston agrees that when § 103(f) refers to "his reference is to miners employed at Deer Creek (Tr. 57 Boston's view the context of that section of the Act representatives of miners on the international level. no knowledge whether Rabbitt's presence had been requ Deer Creek miners. Further, he did not take steps to if Rabbitt had been designated in any Part 40 filing Creek miners (Tr. 57, 58).

UMWA's Evidence

Thomas J. Rabbitt and Joseph Main testified for

Thomas J. Rabbitt has been employed by the UMWA and one half years as an International Health and Saf presentative (Tr. 71).

He reports to Joseph Main, administrator of the and Safety department (Tr. 117). Rabbitt has held va positions involving matters of safety. He also inves accidents, disasters, fires and explosions (Tr. 72). gations have included the Homer City mine disaster, G Colleries as well as numerous accidents and fatalitie held virtually every job in a coal mine. In addition as a safety committeeman for three years (Tr. 72, 73) training includes seminars sponsored by MSHA. These courses given the MSHA inspectors (Tr. 74).

On June 12, 1985 his supervisor assigned him to the recovery of bodies and to monitor the investigati Wilberg mine disaster of December 19, 1984 (Tr. 74, 8 119).

ground work included investigations and search for the Wil victims (Tr. 75). Three or four months after he arrived i the Cottonwood mine was opened. (The Cottonwood is a part now sealed Wilberg mine). In the Cottonwood he has gone o spections in coal producing sections that were unrelated t recovery operations 5/ (Tr. 76).

In January 1986 Rabbitt had written Emery's mining ma ment concerning conditions within the sealed area of the W mine (Tr. 79). A copy of the letter went to various feder state officials as well as the UMWA office (Tr. 80; UMWA E The letter, directed to Emery mine manager John Boylen, wa after a meeting with Emery's mine superintendent. The let complained about the seals at #37 crosscut. Approximately weeks later the seals were isolated and regulated (Tr. 81)

After the January 20th letter Emery began to restrict Rabbitt's access to the mine. He was stopped at the gate manager Boylen had to be notified before he could enter. would then have to go to Boylen or Neldon Sitterud's offic 79, 107, 108). In the sample room a sign stating "Author- ized Persons Only" appeared. Rabbitt accepted Boylen's ex planation of the situation and he had no problem with it (107, 108).

On March 3, 1986 Rabbitt again wrote to Emery's mine at the Wilberg and Cottonwood mines. This letter probably the most concern to management. It addressed certain tech matters and its purpose was to verify a conversation so th would be no later misunderstanding (Tr. 85, 109; UMWA Ex. The process and procedure of entering the mine had worked smoothly for a period of time but it became less smooth af March 3.

The totality of the letters in early March dealt with notice and compliance with MSHA's regulations which had no fully complied with in the past (Tr. 109).

4/ These inspections are described in the transcript at p 146: a 103(i) is a special five day spot inspection requir the Wilberg mine; a 103(g) is a special request inspection representatives of the miners or a miner; a 103(a) is a re quarterly MSHA inspection of the entire mine.

About 45 minutes later manager Boylen refused to let Ra go with the group (Tr. 112, 148). At that point he renewed 24-hour prior notice requirement. Before March 5 Rabbitt ha total access to the mine and no 24-hour prior notice had bee required (Tr. 113, 130, 149). Rabbitt was concerned that Em policies might adversely affect his ability to represent the in investigating this disaster in Utah as well as any other disasters in the future (Tr. 114). But he didn't know if th olicy was directed at his activities (Tr. 122, 123).

Rabbitt also wrote to manager John Boylen on April 12, concerning sealed areas of the Wilberg mine (Tr. 105; UMWA E 5). The letter followed a conversation with Emery officials 106). About a week before April 15, 1986 Rabbitt learned fr Frank Fitzek (chairman of the Deer Creek local union safety mittee) that MSHA inspectors were writing numerous citations orders alleging unwarrantable failures. 7/ The local union wanted Rabbitt's assistance in looking into these matters. local union felt the matters were serious. It was not a poi blank request. But Rabbitt indicated he'd be there in the n eek or two (Tr. 88, 125, 126).

The day before the MSHA inspection of April 15 Rabbitt called Fitzek and advised him he would respond to the reques ext day. Prior to the MSHA inspector's arrival at the gate Fitzek appeared and told Rabbitt that he had notified variou management personnel including White and Peacock. White was reported to have been disturbed at the arrangement (Tr. 89).

6/ 30 C.F.R. § 75.1704-1 authorizes the MSHA district manag pprove an escapeway not in compliance with the specified criteria (Tr. 110).

7/ The Federal Mine Safety and Health Review Commission has defined the term "unwarrantable failure", as contained in § 104(d)(1) of the Act, to mean that the operator failed to abate the condition or practices constituting a violation an knew or should have known the condition existed or that it f to abate because of a lack of due diligence or indifference lack of reasonable care, United States Steel Corporation, 6 FMSHRC 1423, 1436 (1984); Westermoreland Coal Company, 7 FMS 1338, 1342 (1985) citing Zeigler Coal Co., 7 IBMA 280 (1977),

ne manager, questioned Rabbitt's authority to enter under
ntract. [8]/ Rabbitt indicated his authority was under § 10
the Act (Tr. 90). After the men discussed the matter Bos
sued a citation and he gave White 10 minutes to abate (Tr.

White then relented but told Rabbitt he would have to s
iver of liability form. Discussion continued. Boston the
lled his supervisor. White requested another citation. B
mplied and issued a citation (Tr. 91, 92).

Mark Larsen (representative of the miners from the safe
mmittee), Terry Jordan and Dixon Peacock (for Emery) and
bbitt accompanied the inspector underground (Tr. 93). Whi
derground one citation was written concerning the company'
of control plan. The inspection team went to a specific a
cause Emery had requested that MSHA abate certain prior
ations and orders in that area (Tr. 93). During this in-
ection Boston asked for and received opinions from those
esent (Tr. 94). Rabbitt also pointed out one roof control
tion to Boston (Tr. 94).

Rabbitt accompanied Boston until 5 p.m. that day (Tr. 9
about 2:15 p.m. White handed Rabbitt a letter. The origi
d been forwarded to the safety committee of the Union.
bbitt's copy stated that under the wage agreement Emery re
ired 24-hour notice in writing before any international he
d safety representative could enter the mine. White also
ntioned the waiver requirement (Tr. 96, 97; UMWA Ex. 4).

Rabbitt had never previously knowingly [9]/ signed a waiv
e Deer Creek mine or elsewhere. The first time he heard o
iver was on March 11 or 12. However, he signs a check in/
t form which is common at all mines (Tr. 98, 99, 123, 142;
. 5). Rabbitt next saw the waiver release form on April 1
declined to sign it because he thought his supervisors sh
prove such action (Tr. 133, 134; Contestant Ex. 3).

The contract referred to by White was received in eviden
d the scope of its terms are not an issue in the case. Th
reement is entitled "Bituminous Coal Wage Agreement of 198
tween Emery Mining Corp and the International Union United
rkers of America". Article III, section (d) of the contra

uperintendent and persons in the engineering department (Tr. 03, 124). On the second occasion he was underground nine ho e entered various areas of the Deer Creek mine as a result o his investigation (Tr. 103, 124). The Union opposed the etitions for modification that Emery had filed at the Cotton s well as the Deer Creek mines (Tr. 103). In October 1985 abbitt had done a similar investigation at the Deer Creek mi n those occasions, before April 15, there was no discussion bout Rabbitt's ability to conduct such investigations or to nter the property (Tr. 104).

Rabbitt believes his right of entry under § 103(f) can b onditioned on reasonable restrictions such as eye protection equirements (Tr. 135, 136). He didn't feel the hazard train hecklist on Emery's release form was necessary (Tr. 136; ontestant Ex. 3).

Joseph Main testified that he is the administrator of th epartment of Occupational Safety and Health for UMWA (Tr. 15 hirty-five members of his staff of 40 are trained, experienc nd educated international health and safety representatives asically represent the UMWA members on health and safety mat heir duties include conducting inspections at the mines, ssisting plan approvals, processing petitions for modificati iled by the operator, providing assistance to local unions a uidance to the local safety committees (Tr. 154, 155). They lso investigate mine disasters, injuries and accidents that ccur (Tr. 154). The local union safety committee is compris f miners employed full time at the mine site. The local mem erve in an extra capacity as a representative (Tr. 155). Th ackground educational level of the local mine committee is l han the health and safety representatives on the UMWA staff 55).

Main estimates that the UMWA staff is in the field on a aily basis in some type of § 103(f) activity. There are umerous events which trigger a participation with an MSHA in pection. These include investigations of an accident, injur n explosion, a regular inspection, or an inspection made for ome special problem. In addition, participation may occur w he mine operator wishes to modify the law. Many mining plan

---

0/ Section 101(a) of the Act authorizes the Secretary to mod

seriousness of the condition (Tr. 156-157).

The historical application of § 103(f) is to provide a ability for the representatives of miners to assist MSHA to out its function to protect miners' lives. (Tr. 157). Thos representatives of miners who are also employees of the ope are subject to a certain amount of control by the operator 157). Such controls may inhibit the miners from expressing ever views they may have. However, confidentiality is prov for a complaining witness. In addition, there are extensiv provisions [11]/ to protect miners against discrimination. B some miners are reluctant to rely on this protection (Tr. 1 169).

In addition, the local miners are not trained for anal roblems (Tr. 158). The members of UMWA's staff are traine experts participating in various functions on a national sc If the staff was strictly restricted to the provisions of t contract to gain access it would interfere with UMWA's abil rotect the miners (Tr 159).

At times access to the mine is gained through the labo tract and at times under § 103(f) (Tr. 159). The witness described some circumstances of entries under § 103(f)(Tr. 161). In some instances committeemen have been afraid to c he international so the UMWA has bypassed the contractual visions and entered under a § 103(f) inspection (Tr. 161). nternational uses different types of approaches, such as checking abatement dates, etc., to find out when the MSHA inspector will arrive at a mine site (Tr. 161). Witness Ma not aware that any mine operators required the internationa presentatives to sign waivers to gain access to the mine (T 162). The only occasion known to the witness where an oper questioned a Part 40 filing was evolved in the Consolidatic Company case (cited, infra).

Main assigned Rabbitt and several other representative the Wilberg mine (Tr. 163). The representatives are charge coordinating the investigation.

Among other duties the international representatives a inspect Emery's mines based on complaints they receive. In addition, they have helped recover the victims of the Wilbe disaster (Tr. 163).

the miners is basically a decision making process on the
the miners at the mine in conjunction with the organizatio
representation rights (Tr. 166).

The miners that are employed at the mine have a right
designate their representatives. The UMWA has the inherer
right, based on its organizational structure and the fact
they are the bargaining representative of those employees,
have access to the mine under § 103(f). In sum, once the
at the mine designate the UMWA International they designat
for all provisions of the Act (Tr. 168).

The persons designated in the Part 40 regulations are
with MSHA and the operator. The filings under Part 40 pro
mechanism for the miners at the mine to designate their re
sentatives (Tr. 170).

Emery's Evidence

Earl R. White, James T. Jensen, Dave Lauriski, Willia
Ponceroff and John Barton testified for Emery.

Earl R. White, the mine manager and top management of
at the Deer Creek mine, is presently employed by Utah Powe
Light. On April 15, 1986 he served in the same capacity
Emery Mining Company (Tr. 171, 172, 196). White is respor
for the mine, its production, its surface facilities and
transportation of the coal (Tr. 173).

On April 15 at 7:45 a.m. Frank Fitzek (chairman of th
safety committee) and Joe Crespin, (a member of the pit co
12/), entered his office at the mine and stated that Tom
would be visiting the mine that day. This time of the day
volved a shift change and White was very busy. White call
Terry Jordan, safety engineer at Deer Creek, to inquire as
what was "going on"; in addition, he asked if they had bee
notified. At that particular time there was a closure ord
the third south belt, one of the main belt arteries in the
(Tr. 174, 175). On inquiry Fitzek denied inviting Rabbitt
White asked what provision of the contract was involved.
miner replied it was under paragraph 1 of Article III, sec
(d) of the labor contract (Tr. 175, 176). White asked if
had invited Rabbitt underground to look at something in
particular. His reply was nagative. They wanted Rabbitt
to White. White complained about the short notice. The

A inspector (Tr. 178). White objected because Rabbitt wa
posed to be talking to him, not going on an inspection wi
federal inspector (Tr. 178). Since becoming the mine ma
April 29, 1985 White had not known of any non-employee be
itted as a representative of miners under § 103(f)(Tr. 2
).

White, Rabbitt and Larsen met. Rabbitt inquired if the
a problem if he traveled with the inspector. White said
not been notified and he also asked under what provision
contract was the inspection being made. Rabbitt replied
entering under § 103(f) (Tr. 178-180). White then read
while conferring with Jordan, Peacock, Boston, Rabbitt a
en. White refused to let Rabbitt accompany the inspecto
te stated that it was clear that the walkaround man is th
oyee authorized by the miners at the mine (Tr. 181, 182
ton said he would write a citation and he gave White 10
utes to reconsider. If the company continued its refusal
ld then write an order (Tr. 182).

White then called his superior, Dave Lauriska, and disc
details with him (Tr. 182, 183). Lauriska agreed with
te's position. White said they were going to get an orde
Lauriska said they didn't need another order and he
tructed White to abate the citation if Rabbitt signed the
er (Tr. 183).

The guard in the shack said Rabbitt hadn't signed the
m. On rechecking Lauriska said Rabbitt could not go unde
und without signing the form (Tr. 184). A waiver was bro
and discussed. Boston called his supervisor (Ponceroff)
ton said he would include the waiver matter on the previ
ation (Tr. 186; Contestant Ex. 1). White relied on the
ation in permitting Rabbitt to go underground. Upon Whi
and, Rabbitt returned the unsigned waiver (Tr. 187).

At this point Inspector Boston and the walkaround part
erground (Tr. 187).

At about 2:30 p.m., when the group came out of the min
re was a further discussion about the walkaround citatio
related to the waiver agreement. White understood anoth
ation would be written (Tr. 188-190).

Emery maintained two clearly marked sign-in, sign-
One says "Company Visitor Release", the other says "Non
Visitor Release" (Tr. 192, 193). No portion of the tex
obscured by the punch holes or the bar (Tr. 193). An h
he testified White had verified the condition of the bo
his secretary (Tr. 194).

Prior to April 15, White had never discussed § 103
management or members of the local union (Tr. 197). Wh
construed § 103(f) to relate exclusively to employees o
(Tr. 198).

About mid-March White first became aware of the wa
policy. He was advised of it by Dave Lauriski and Stan
(Emery's director of security) (Tr. 199, 213).

Under Emery's policy a visitor is any non-employee
federal or state inspector at the mine (Tr. 199).

On April 15 Rabbitt signed under the old release p
That form shows a check number. The visitor retains th
tag with a number stenciled into it (Tr. 201; Contestan
Its purpose is to identify the persons in the mine (Tr.
The check-in, check-out procedure is mandated by federa
202).

White did not know on April 15 but he agreed that
definitions in 30 C.F.R. Part 40 [40.1(b)(1)] defines a
sentative of miners as any other person or organization
represents two or more miners at a coal or other mine (
207).

White outlined, in detail, his previous mining exp
(Tr. 208-210).

The contract provision authorizing access for the
national safety and health representatives does not con
reference to a 24-hour notice (Tr. 211). The only noti
provision in the contract provides as follows: "The com
shall give sufficient advance notice of the intended in
to allow a representative of the employer to accompany
committee" (Tr. 211). The safety and health committee
regular monthly inspections under the contract (Tr. 212

Witness Jensen prepared and implemented Emery's releas
ver form (Tr. 219). At the time of the Wilberg accident
4 Emery carried general liability insurance aggregating
,500,000. When these policies expired in June 1985 only
,500,000 in insurance coverage could be procured (Tr. 21
base policy was $500,000, then a first level of excess
at $10 million, then $5.1 million and then another $15
llion.

In October or November the first $10 million excess wa
ncelled. Hence, there was a gap in the coverage (Tr. 221
company was able to find a $1 million partial replaceme
licy (Tr. 221). In December 1985 the $15.1 was cancelled
ery's efforts at replacement were unsuccessful (Tr. 221).

The additional insurance coverage was not available at
st and the $1.5 million coverage was, in Emery's opinion,
adequate (Tr. 222).

After consultation it was determined that Emery would
ntinue in business and also attempt to limit its exposure
2-223).

Emery's employees were covered by workman's compensati
areas of potential exposure involved claims by non-empl
. 223). It was decided to use a release and waiver appr
r those entering the company property. Existing and new
re reviewed (Tr. 223-225; Contestant Ex. 3, 4). There we
scussions concerning the status of mine rescue terms from
mpanies, federal inspectors or UMWA representatives in co
ction with the release and waiver forms (Tr. 224, 225, 23

The Wilberg disaster generated claims and caused the c
focus on non-employee visitors. But lawsuits against Em
n-employees were not an extensive part of the litigation
total of such claims would be within Emery's $1,500,000
verage (Tr. 226-228).

The final release form was finally approved in the lat
rt of February 1986 (Tr. 231). In part, the policy came
ter a vendor was killed in a Kaiser mine (Tr. 231).

Dave Lauriski, Emery's director of health and safety,

iver policy has been continued by UP&L but the basic reason
e policy was negated by UP&L's insurance capability (Tr. 260
uriski indicated the older form was "very loose" (Tr. 240;
ntestant Ex. 4). After receiving forms from various compan
riski began to develop Emery's new form based on the compar
perience (Tr. 241). At that point he added on the form the
zard recognition or training checklist for all non-employee
rsonnel. The draft form was approved by various individuals
o reviewed it (Tr. 242). In early March 1986 a final form
erged (Tr. 243; Contestant Ex. 3, 5). An interoffice memo-
ndum, dated March 21, 1986, identified those who would have
gn the waiver and those exempt from signing it (Tr. 245;
ntestant Ex. 5). One of the criteria used to determine whet
person should be required to sign the waiver was the risk
volved after the person entered the mine property (Tr. 246)

The first exemption involved state and federal agencies
ne property for reasons relating to coal production and/or
spections or enforcement actions. Even if any of these
dividuals were injured on mine property Emery believed it w
t be held liable for such injuries (Tr. 246, 270, 282). An
ditional exemption focused on the employees of common carri
ch as United Parcel and Uintah Freight. These individuals
empt because of existing contracts holding Emery harmless i
e event of injury to them. Further, Emery didn't think the
sk was great enough for them to sign a waiver for each entr
e mine property (Tr. 247, 270, 283). In addition, the comm
rrier personnel do not go underground (Tr. 247, 283). A
rther exemption involved Lowdermilk Construction Company.
mpany does underground and surface work at the mine 100 per
the time (Tr. 247). In addition, the Lowdermilk contract
demnifies and insures Emery (Tr. 248).

An additional exempted class consists of employees of Ut
wer and Light. UP&L owns these particular coal mines and E
rves as the operator (Tr. 248).

With the exception of the four described classes of pers
e waiver of liability policy applies to all other non-emplo
sitors to Emery's mines (Tr. 248).

The Emery people who developed the exemptions (Lauriski,
nsen, Cowan and Rajski) did not discuss the status of mine
scue teams entering the property. But such teams are exemp

The hazard training checklist incorporated with the rele
m used at Deer Creek mine is identical to the form used at
ner Emery mines (Tr. 268). Lauriski directed the mine mana
implement the program (Tr. 250, 251).

Emery's mines consist of three separate complexes
ographically very close but with three different entrances.
e mines are independent. They are known as the Deer Creek
e, the Des-Bee-Dove complex and the Cottonwood Wilberg co
er Creek mine overlies the Wilberg mine (Tr. 252, 293). Ea
the three mines has its own security system (Tr. 252). A
curity guard records the times when visitors enter the pro
rther, they are responsible for a visitor signing the waiv
. 253).

Tom Rabbitt was the only person known to Lauriski who
fused to sign the waiver although for the preceding six or
ven months it had been the practice for Rabbitt to come on
ery's property day or night without its knowledge (Tr. 253
8-289).

Witness Lauriski identified an exhibit which consisted
rge number of waiver and release forms. The forms receive
idence were generated at the Deer Creek mine between March
86 and April 27, 1986 (Tr. 254, 290; Contestant Ex. 6). A
e forms had been signed by non-employee visitors to the mi

Up until the events of April 15, 1986 Lauriski was not
any person asserting the right to enter an Emery mine und
103(f) of the Mine Act (Tr. 255, 273, 287).

In cross examination Lauriski agreed that during a § 10
spection in January 1985 four UMWA health and safety repre
ntatives accompanied the federal inspectors during an
ectrical inspection (Tr. 285).

When a representative of the UMWA, who is also an non-
ployee, enters the mine under a contract right Emery requi
at waiver be signed (Tr. 268).

On April 15, 1986 Lauriski instructed White to abate th
tation rather than take a closure order. He did not under
that time whether the closure order would be a "no-area
fected order" (Tr. 256, 257). In three subsequent similar
ents Emery accepted the closure order (Tr. 257). The refu

On two occasions during the delays of the Wilberg disa investigation, Rabbitt went underground in the Deer Creek m look at a two entry mining system (Tr. 262). He also enter Cottonwood mine in late 1985 for the same purpose (Tr. 262) has also been underground in the Wilberg mine and participa the recovery operations (Tr. 262). Further, the witness do dispute the claim that Rabbitt accompanied the inspectors o routine inspections (Tr. 286).

Witness Lauriski was aware of Rabbitt's letter in Janu dealing with the seals (Tr. 263). The company thought Rabb was reiterating positions already decided on by the company 264). The company was irritated over the second letter (Tr 264).

William Ponceroff, called as an adverse witness, indic that he is the supervisor at the MSHA field office in Orang (Utah)(Tr. 300).

Witness Ponceroff, a person experienced in mining, hol degree in safety (Tr. 301-303). The field office, with six inspectors, has ten mines under its jurisdiction (Tr. 303).

At the time of this incident MSHA inspector Boston cal Ponceroff and advised him that mine management refused to p a UMWA representative to travel with him unless he signed a waiver (Tr. 305, 306). Ponceroff was not familiar with the waiver form nor did he attempt to learn about it. Abatemen was not discussed.

In a similar incident about March 5, 1986 MSHA inspect Baker had not taken any action (Tr. 306, 307). At a staff meeting a few days later the issue was discussed. It was d that if any union representative on an international level to accompany the inspector the company was to have equal representation. If the operator refused then a citation wa be issued. If the operator failed to comply then a (b) ord would be issued but it would be a no-closure type of order 309, 310). The foregoing policy resulted in the instructio given to Boston on April 15, 1986 (Tr. 310).

When Boston called him, Ponceroff was not aware Rabbit previously signed any release forms. In any event, that fa woul[illegible]e affect d his judgment (Tr. 310).

d waiver (Tr. 313, 325). However, if a representative of mi
es not act in an orderly fashion or hinders the inspection
y manner, he would be asked to leave and someone else would
ected (Tr. 326).

After April 15 no person employed by Emery indicated tha
obitt should not be considered as a representative of the
ners at the mines (Tr. 326). On the Part 40 filing form th
WA is one of the organizations named as a representative of
ners (Tr. 326, 327; Contestant Ex. 7).

Witness Ponceroff testified concerning situations where
sputes might arise over different individuals claiming to b
resentative of the miners (Tr. 327, 328).

Ponceroff's duties include enforcement of MSHA's regulat
der 30 C.F.R. Part 40. The Part 40 regulations require re-
esentatives of miners to make certain designations and file
rtain documents with the MSHA District Manager (Tr. 314).

On July 30, 1984 a Part 40 document was filed with MSHA
angeville office (Tr. 315, 316; Contestant Ex. 7). The doc
nt received in evidence was the most recent on file and it
entifies for MSHA the representatives at the various mines
6, 317). Boston's call of April 15 did not inquire as to
me of the individual who was listed as a representative of
ners at the Deer Creek mine (Tr. 318). The form designate
ll represent the miners under various sections of the Act
2, 323).

The parties stipulated that UMWA international represen
ve Rabbitt was not listed as a named delegate on any filin
der Part 40 associated with any of the Emery mines (Tr. 32

Ponceroff did not recognize the name of any UMWA inter-
ational representative on the Part 40 form (Tr. 324). Nor
e look at the filing made by the Deer Creek miners (Tr. 324

John W. Barton, called as an adverse witness, testified
his education and experience in mining. He further ident
imself as the district manager of District 9 for Coal Mine
ealth and Safety (Tr. 330, 344, 345). He is responsible fo
otal administration of the Act. He has 110 employees and f
rimary divisions including administrative, education and
industry), an engineering

When changes are made in Part 40 filings by individual m
SHA accepts such changes as a matter of course and enters th
s part of the official MSHA file (Tr. 332). On occasion min
ave been directed to use MSHA forms (Tr. 333). Barton
entified the form prepared in his office. It was prepared
nvenience for miners' representatives (Tr. 333, 334).

Barton considers Part 40 to be a procedure available to
orkers. However, in accordance with the Secretary's directi
SHA is told to take a very broad view of miners participatic
ights (Tr. 343, 344, 356). Portions of the Part 40 regulati
se the term "shall", (Tr. 356) but the witness believed the
ording in the preamble instruct him how to interpret the req
ation (Tr. 357). In Barton's opinion Inspector Boston acted
orrectly (Tr. 358).

Section 103(f) is a general provision of the Act that al
non-employee miners' representative to travel with the
epresentative of the Secretary (Tr. 335, 350). Such an
ndividual is not an employee of the agency but is present to
ssist the MSHA inspector (Tr. 350). The regulations state t
articipation by a miners' representative cannot interfere wi
he active completion of the inspection. The inspector has
uthority under the law to prevent a representative from furt
raveling with him (Tr. 351). MSHA encourages the representa
ives to have some input into the inspections (Tr. 351). Bar
nly knew of one instance where an intentional representative
he UMWA was denied access to a mine (Tr. 349).

In Barton's understanding, the Act and its regulations s
o encourage miners to participate and to bring forth people
ould best serve the purpose on any particular inspection (Tr
49). This evolves from the fact that miners at an individua
ine do not have a great amount of experience and therefore
utside representation and wider experience can be of great b
it to the rank and file members (Tr. 349, 350). The miners
resentatives are chosen at the descretion of the employees a
he mine (Tr. 335, 336). Such descretion can be exercised by
ubmitting the form or by submitting a miners' representative
hen the inspector arrives at the mine (Tr. 336). The preamb
n Government Exhibit 3 (the Secretary's bulletin of July 7,
978) states, in part, that "it should be noted that miners a
heir representatives do not lose their statutory rights unde
103(f) by their failure to file as a representative of the
n rs un er h s part" Tr. 336).

s under the Act (Tr. 340). Further, the regulations defi
term "representatives of miners" (Tr. 341).

Barton analyzed a procedure to be followed if conflictin
ims arise between different persons claiming to be represe
es of miners (Tr. 354, 355).

In rebuttal Forrest Adison and Mark Larsen testified for

.

Forest Adison has been employed at the Wilberg mine for
ht years. His local union offices include safety committe
mine committeeman (Tr. 360). Adison was present at a mee
h mine management representatives Neldon Sitterud, Jorgens
ift foreman), John Boylen, and Baker (MSHA) at the Wilberg
on March 5. At that time Adison requested that internat
representative Tom Rabbitt accompany him on a regular
rterly safety inspection conducted by Bob Baker. There wa
stion of a variance involving an escapeways in the Wilberg
e (Tr. 361, 366). Sitterud told Rabbitt he had no right t
er the mine. He and Boylen were not aware of the Act. Ba
k no enforcement action when the company refused to allow
bitt to walkaround. Adison considered Rabbitt to be his
resentative protecting him and keeping the membership awar
ivities (Tr. 362-367). Since the mine disaster he has ask
international union representatives about matters within
ir expertise (Tr. 364).

Mark S. Larsen, a safety committeeman for the two years,
n employed at the Deer Creek mine for seven years (Tr. 368
, 373).

On April 15, 1986 Larsen was present to accompany the MS
pector whom he met at the gate. The two men picked up Rab
er, in his office, White questioned Rabbitt's authority to
er the mine under the contract. Rabbitt stated his entry
under the contract but under § 103(f) of the Act (Tr. 369
). When he read the Act, White said Rabbitt was not an
loyee. Rabbitt agreed but stated that he would suffer no
es by accompanying the inspector (Tr. 370). Larsen indica
bitt was being paid in part by the local union dues of $40
th (Tr. 370, 371).

As the argument continued Larsen told White that he felt
bitt was his representative (Tr. 371). The MSHA citation

and sign-out books at the mine (Tr. 375, 376).

Discussion

This case turns on the interpretation of § 103(f) of t Federal Mine Safety and Health Act of 1977. 14/

The walkaround participation right was first enacted Federal Coal Mine Health and Safety Act of 1969, 83 Stat. Public Law 91-173. Section 103(h) thereof provided as follo

> (h) At the commencement of any inspection of a coal by an authorized representative of the Secretary, t authorized representative of the miners at the mine the time of such inspection shall be given an oppor to accompany the authorized representative of the S tary on such inspection.

The 1977 amendment, enacted in § 103(f), considerably broadened the walkaround participation right and addressed issue of pay when a representative of miners accompanied th inspection team.

Specifically, such representative of miners "who is a employee of the operator shall suffer no loss of pay ..." Clearly, then, Congress contemplated that non-employees may representatives of miners. Commission Judge James A. Brode ruled to this effect in Consolidation Coal Company v. Secre of Labor et al, 2 FMSHRC 1403 (1980).

In fulfilling his statutory rulemaking mandate contain the 1977 Act the Secretary issued his interpretative bulle Fed. Reg. 17546, (April 25, 1978) setting for his general interpretation of the scope of § 103(f). The bulletin prov in part, as follows:

14/ This section has been before the Courts of Appeals in v. Federal Mine Safety and Health Review Commission, 671 F. 615 (DC Cir. 1982), cert. denied 74 L. Ed.2d 189 (1982); Ma Copper Company v. Secretary of Labor, 645 F.2d 694 (9th Ci 1981) cert. denied 50 U.S.L.W. 3296 (1981); Consolidation Co. v. Federal Mine Safety and Health Review Commission, 7 271 (3rd Cir. 1984); Monterey Coal Co. v. Federal Mine Safe Health Review Commission, 743 F.2d 589 (7th Cir. 1984).

safety and health activity. Therefore, under the Act, ners and representatives of miners are afforded a wide nge of substantive and procedural rights.
ction 103(f) provides an opportunity for the miners, rough their representatives, to accompany inspectors ring the physical inspection of a mine, for the purpose aiding such inspection, and to participate in pre- or st-inspection conferences held at the mine. As the Senate mmittee on Human Resources stated, "If our national mine fety and health program is to be truly effective, miners ll have to play an active part in the enforcement of the t.' S.Rep. No. 95-181, 95th Cong., 1st Sess., at 35 977).

ther, in 1978 the Secretary promulgated 30 C.F.R. Part 40 he defined a representative of miners to mean: "(1) Any or organization which represents two or more miners at a other mine for the purposes of the Act" and (2) "Repre- ves authorized by miners", "Miners or their representa- "authorized miner representative" and other similar terms appear in the Act. (§ 40.1).

agree with Emery that it seems beyond contradiction that e two principal reasons for the § 103(f) walkaround right e to increase the safety awareness of miners and to more thorough inspections through the participation of amiliar with the conditions being inspected. However, I concur with Emery's view that a colloquy 15/ between s Helms and Javits is determinative of the final scope of ction.

trary to Emery's views Senate Report No. 95-181 contained legislative history is much more persuasive. On the point ort states as follows:

right of miners and miners' representatives to accompany spectors
ction 104(e) contains a provision based on that in the al Act, requiring that representatives of the operator and ers be permitted to accompany inspectors in order to sist in conducting a full inspection. It is not intended, wever, that the absence of such participation vitiate any ations and penalties issued as a result of an inspection.

and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspecti and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the in spector in performing his duties. The Committee also recognizes that in some circumstances, the miners, the operator or the inspector may benefit from the participati of more than one representative of miners in such inspecti or conferences, and this section authorizes the inspector permit additional representatives to participate.

(Emphasis added)

Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session 616, 617 (July 1978).

In short, the Senate in its formal report had no difficult ding that the inspector might include additional miners' resentatives to participate with him in the inspections.

In support of its position, Emery cites Emery Mining poration, 783 F.2d 155, 158 (10th Cir. 1986), Council of thern Mountains, Inc., v. Federal Mine Safety and Health lew Commission, 751 F.2d 1418 (DC Cir. 1985), and Stouffer nical Company v. E.P.A., 647 F.2d 1075 (10th Cir. 1981), amo er cases.

The cited Emery case is not controlling. In Emery the cou iewed the scope of a different section of Act, namely § 115. ther, the Court emphasized that none of the Secretary's herwise extensive regulations" addressed the issue of the rator's liability to pay newly hired miners for their costs eiving 32 hours of miner training, 383 F.2d at 159. The tant case involves the Secretary's interpretative bulletin b e particularly he has defined a representative of miners to erson or organization which represents two or more miners. Rabbitt is such a person and the UMWA, intervenor, is such

Emery's view that a distinction exists between employee ar
n-employee representatives. The Court stated that "(t)he
uncil is a non-employee miners' representative. The Mine A
wever, merely refers to 'representatives' and does not
ticulate any distinction between the rights of employee and
n-employee representatives", 751 F.2d at 1421.

Further, in footnote 31 the Court noted: "Our holding is
nited to situations were miners' representatives assert an
dependent right to enter mine property for monitoring purpo
has no application to instances where representatives asse
atutory right under Section 103(f) to accompany federal mi
pectors investigating mines for compliance with statutory
gulatory safety training requirements", 751 F.2d at 1418.

In Stauffer Chemical Company the question before the Cou
olved the right of access by EPA's contractor under the C
Act. Stauffer provides no support for Emery's position t
miner's representatives must be employees of the operato
der to be allowed access to mine property. Under § 103(f)
bbitt was not an employee of the Secretary. He was an empl
the miners at the Deer Creek mine.

Emery's search warrant cases, commencing with Camara v.
nicipal Court of the City and County of San Francisco, 387
3 (1967) and its progenity illustrate a principle of law.
e Supreme Court has already ruled that a search warrant is
quired under the Mine Act, Donovan v. Dewey, 101 S. Ct. 25
981). The right of the international representative under
103(f) is to inspect mine property at the same time and in
esence of the MSHA inspector.

On this record it is uncontroverted that the UMWA Inter
tional was bound by its collective bargaining agreement to
ery and its miners. Further, Emery knew Rabbitt was a UMW
ternational representative. Rabbitt and UMWA both meet th
cretary's definitions of a miners' representative. Furthe
ners Fitzek, Addison and Larsen wanted Rabbitt's expertise
sistance. A portion of the local union dues go to Rabbitt
ges.

The foregoing facts cause me to conclude that Rabbitt m
rticipate in a walkaround inspection with the MSHA inspect
matter of statutory right.

claims from this class of persons was within Emery's initial coverage of $1,500,000. In addition, the insurance problem resolved when Utah Power and Light took over the operation c mines.

In any event, § 103(f) does not condition the internati representative's access upon a waiver of that person's right seek redress for injuries that might be sustained as a resul the operator's negligence. The right to apply to the courts relief from the perpetration of a wrong is a substantial rig Bracken v. Dahle et al, 68 Utah 486, 251 P. 16 (1926).

In addition, the State of Utah's Constitution in Articl Section 11 provides as follows:

> All courts shall be open, and every person, for an i done to him in his person, property or reputation, s have remedy by due course of law, which shall be adm tered without denial or unnecessary delay; and no pe shall be barred from prosecuting or defending before tribunal in this State, by himself or counsel, any c cause to which he is a party.

The State of Utah has included the above right within t protection of its constitution. It would appear that if Eme position were sustained, serious 10th Amendment implications could arise.

Emery may well have the right, in dealing with the memb of the public, to condition access to its mine. There are certain benefits accruing to sales representatives and simil persons in entering a mine. The signing a waiver in those c is an appropriate quid pro quo for the expanded business opp tunity. But the person seeking access here is acting under statutory provision. The Commission has noted that access u this provision plays an important role in the overall enforc scheme of the Act. It is therefore inappropriate for Emery equate the UMWA international representative's access with t of a sales representative in determining the appropriateness validity of the operator's release and waiver requirement. Providing access to the former was determined by Congress to an important means of achieving the goal of improved health safety in our nation's mines. Providing access to sales rep sentatives and the like does not relate to the achievement o goals tha are the public interest and ha mat er s l f

st that the UMWA international representative sign a waive
or to exercising § 103(f) rights.

Emery's policy also requires 24 hour advance notice befor
y into a mine will be permitted. However, it is not
essary to explore this aspect of the case because the notic
irement clearly relates to entry under the terms of the wa
eement (UMWA Ex. 4). And the parties agree the terms of th
e contract are not an issue in the case.

The final issue centers on whether Emery may refuse entry
international representative Rabbitt merely because he wa
designated by name in the filings made under 30 C.F.R. Par

This issue was squarely addressed by the Commission in
olidation Coal Company, 3 FMSHRC 617 (1981).

In the Consol case the inspection was requested by the
ety committee of the UMWA local. The UMWA was the collecti
gaining representative of the miners. The operator refused
ry on the grounds that their names had not been submitted
suant to 30 C.F.R. Part 40.

In considering the issue the Commission stated as follows

We have previously recognized the important role section
103(f) plays in the overall enforcement scheme of the Act
both in assisting inspectors in their inspection tasks an
in improving the safety awareness of miners. (Case cited)
We are not prepared to restrict the rights afforded by th
section absent a clear indication in the statutory langua
or legislative history of an intent to do so, or absent a
appropriate limitation imposed by Secretarial regulation.

Neither the statute nor the legislative history indicates
that prior identification of miners' representatives is a
prerequisite to engaging in the section 103(f) walkaround
right, and Part 40 on its face is silent as to the intend
effects of a failure to file. The preamble to Part 40 dc
discuss, however, the intended effect of the filing regu-
lations on walkaround participation. It states:

> [I]t should be noted that miners and their representa-
> tives do not lose their statutory rights under section

In footnote 3 of the decision the Commission further served:

> The Part 40 filing requirements were not promulgated mere to identify miners' representatives for section 103(f) pu poses. As the preamble to Part 40 noted, the Act "requi the Secretary of Labor to exercise many of his duties unc the Act in cooperation with miners' representatives." 4 Fed. Reg. 29508 (July 7, 1978). Filing under Part 40 serves, among other things, to identify such representat. that they will be included in the processes contemplated the Act. See, e.g., sections 101(e), 103(c), 103(g), 105(a), 105(b), 105(d), 107(b), 107(e), 109(b), 305(b). 3 FMSHRC at 618, 619

In the Consol case the operator was well aware of who the MWA safety representatives were and why they were at the mine ikewise, in the instant case, international representative abbitt was well known to Emery's management.

For the foregoing reasons, I conclude that the mere failu representative Rabbitt to file under 30 C.F.R. Part 40 does ot authorize the operator to deny access under § 103(f).

Briefs

The parties have filed pre-trial and post-trial briefs wh ave been most helpful in analyzing the record and defining t ssues. However, to the extent they are inconsistent with th ecision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made he narrative portion of this decision, the following conclus f law are entered:

1. The Commission has jurisdiction to decide this case.

2. Contestant failed to meet its burden of proof to es- ablish that Citation 2834575 should be vacated.

3. The contest of Citation 2834575 should be dismissed.

John J. Morris
Administrative Law Judge

stribution:

an A. Macleod, Esq., Ellen Moran, Esq., Crowell & Moring, l
nnecticut Avenue, NW, Washington, D.C. 20036 (Certified Ma

vard H. Fitch, Esq., Office of the Solicitor, U.S. Departme
Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certif
l)

y Lu Jordan, Esq., United Mine Workers of America, 900
fteenth Street, NW, Washington, D.C. 20005 (Certified Mail

lc

substituted for	:	
EMERY MINING CORPORATION,	:	Docket No. WEST 86-131-
Contestant	:	Order No. 2833458; 4/22
	:	
v.	:	Wilberg Mine
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA,	:	
Intervenor	:	

DECISION

Appearances: John Macleod, Esq., Crowell & Moring, Washi
D.C.,
for Contestant;
Edward H. Fitch, Esq., Office of the Solici
U.S. Department of Labor, Arlington, Virgin
for Respondent;
Mary Lu Jordan, Esq., United Mine Workers c
America, Washington, D.C.,
Intervenor.

Before: Judge Morris

This case, heard under the provisions of the Federal
Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (
arose from an inspection of contestant's Wilberg mine on
22, 1986. On that date a federal mine inspector issued C
2833458 under § 104 of the Act.

A hearing on the merits commenced in Denver, Colorad
14, 1986.

Stipulation

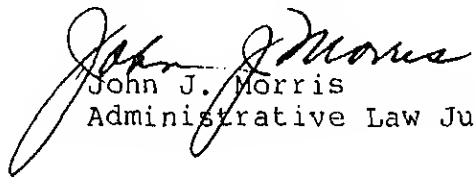
The parties agreed that the ruling in WEST 86-126-R
controlling in this case (Tr. 18-20).

3. The contest of MSHA Order No. 2833458 herein shou dismissed.

ORDER

Based on the stipulation of the parties and the concl of law I enter the following order:

The contest of Order No. 2833458 is dismissed.



John J. Morris
Administrative Law Judge

Distribution:

John Macleod, Esq., Crowell & Moring, 1100 Connecticut Ave NW, Washington, D.C. 20036 (Certified Mail)

Edward Fitch, Esq., Office of the Solicitor, U.S. Departme Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certif Mail)

Mary Lu Jordan, Esq., United Workers of America, 900 Fifte Street, NW, Washington, D.C. 20005 (Certified Mail)

/blc

substituted for EMERY MINING CORPORATION, Contestant	:	Docket No. WEST 86-140-R Order No. 2833456; 4/17/86
v.	:	Wilberg Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent and UNITED MINE WORKERS OF AMERICA, Intervenor	:	

DECISION

Appearances: John Macleod, Esq., Crowell & Moring, Washingt
D.C.,
for Contestant;
Edward H. Fitch, Esq., Office of the Solicitor
U.S. Department of Labor, Arlington, Virginia,
for Respondent;
Mary Lu Jordan, Esq., United Mine Workers of
America, Washington, D.C.,
Intervenor.

Before: Judge Morris

This case, heard under the provisions of the Federal Mi
Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the
arose from an inspection of contestant's Wilberg mine on Apr
17, 1986. On that date a federal mine inspector issued Orde
2833456 under § 104 of the Act.

A hearing on the merits commenced in Denver, Colorado o
14, 1986.

Stipulation

The parties agreed that the ruling in WEST 86-126-R wou
controlling in this case (Tr. 18-20).

2. On this date an order was entered dismissing the in WEST 85-126-R.

3. The contest of MSHA Order No. 2833456 herein sho dismissed.

ORDER

Based on the stipulation of the parties and the conc of law I enter the following order:

The contest of Order No. 2833456 is dismissed.

John J. Morris
Administrative Law Judge

Distribution:

John Macleod, Esq., Crowell & Moring, 1100 Connecticut A NW, Washington, D.C. 20036 (Certified Mail)

Edward Fitch, Esq., Office of the Solicitor, U.S. Departm Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Cert Mail)

Mary Lu Jordan, Esq., United Workers of America, 900 Fif Street, NW, Washington, D.C. 20005 (Certified Mail)

/blc

substituted for	:	
EMERY MINING CORPORATION,	:	Docket No. WEST 86-141-R
Contestant	:	Order No. 2835048; 4/23/8
	:	
v.	:	Cottonwood Mine
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA,	:	
Intervenor	:	

DECISION

Appearances: John Macleod, Esq., Crowell & Moring, Washing
D.C.,
for Contestant;
Edward H. Fitch, Esq., Office of the Solicito
U.S. Department of Labor, Arlington, Virginia
for Respondent;
Mary Lu Jordan, Esq., United Mine Workers of
America, Washington, D.C.,
Intervenor.

Before: Judge Morris

This case, heard under the provisions of the Federal M
Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (th
arose from an inspection of contestant's Cottonwood Mine on
23, 1986. On that date a federal mine inspector issued Ord
2835048 under § 104 of the Act.

A hearing on the merits commenced in Denver, Colorado
14, 1986.

Stipulation

The parties agreed that the ruling in WEST 86-126-R wo
controlling in this case (Tr. 18-20).

1. The Commission has jurisdiction to decide this case.

2. On this date an order was entered dismissing the conte
ST 85-126-R.

3. The contest of MSHA Order No. 2835048 herein should be
ssed.

ORDER

Based on the stipulation of the parties and the conclusion
w I enter the following order:

The contest of Order No. 2835048 is dismissed.

John J. Morris
Administrative Law Judge

ibution:

Macleod, Esq., Crowell & Moring, 1100 Connecticut Avenue,
ashington, D.C. 20036 (Certified Mail)

d Fitch, Esq., Office of the Solicitor, U.S. Department of
, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified

Lu Jordan, Esq., United Workers of America, 900 Fifteenth
t, NW, Washington, D.C. 20005 (Certified Mail)

Petitioner	:	A. C. No. 01-00515-03632
	:	
v.	:	Mary Lee No. 1 Mine
	:	
ALABAMA BY-PRODUCTS CORP., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor U.S. Department of Labor, Birmingham, Alabama for Petitioner.

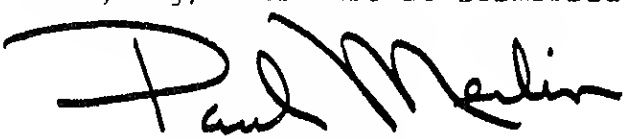
Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary against Alabama By-Products Corporation. By Notice of Hearing dated July 22, 1986, the hearing was set for August 6, 1986, in Birmingham.

On August 5, 1986, at the conclusion of hearings on cases set for that day, the Solicitor asked to be heard with respect to this case. The Solicitor advised on the record that the citation which was the subject of the penalty assessment had been vacated by MSHA. He moved to dismiss, explaining that the citation had been issued for a violation of the operator's roof control plan but that upon further consideration MSHA had concluded that the plan did not cover the situation in question. Upon inquiry from the bench, the Solicitor gave assurances that both the operator and MSHA were now reviewing the roof control plan in light of this case.

Finally, the Solicitor advised that, if required, operator's counsel would appear the following morning as had been scheduled. However, in light of the Solicitor's representations, further appearances by counsel were excused and additional hearing was deemed unnecessary.

In light of the foregoing, this case is Dismissed.



Paul Merlin

bor, Suite 201, 2015 Second Avenue North, Birmingham, AL
(Certified Mail)

M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C.,
Floor, Watts Building, Birmingham, AL 35203 (Certified

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 86-19
Petitioner	:	A.C. No. 05-01370-03550
	:	
v.	:	Eagle No. 5 Mine
	:	
EMPIRE ENERGY CORPORATION,	:	
Respondent	:	

DECISIDN APPROVING SETTLEMENT

Before: Judge Carlson

The parties have submitted a joint motion to approve settlement agreement. Specifically, the Secretary asks le amend the penalty proposed for citation 2072087 from $10,0 to $7,500.00 on grounds that the operator's negligence pro be less than originally believed. The Secretary also asks to amend the proposed penalty for citation 23333640 from $ to $78.00 for the same reason. Finally, the Secretary mov citation 2072088 be vacated on grounds that he lacks suffi evidence to establish the violation.

The respondent, in turn, agrees to withdraw its notic contest to citations 2072087 and 2333640 if the settlement approved.

Based upon the representations of the parties and the contents of the file, I conclude that the settlement agree appropriate and should be approved in its entirety.

Accordingly, the settlement agreement is approved and attendant motions are granted. Citation 2072088 is vacate Respondent shall pay a total civil penalty of $7,578.00 fo remaining two citations within forty days of the date of t decision. This proceeding is dismissed.

SO ORDERED.

John A. Carlson
Administrative Law Judge

Henry Rose, Esq., Rose, Schmidt, Chapman, Duff & Hasley, er Building, Pittsburgh, PA 15222-5369 (Certified Mail)

AUG 12 1986

MARTHA PERANDO, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. YORK 85-12-D
	:	MSHA Case No. MORG CD 85-1
METTIKI COAL CORPORATION, Respondent	:	

DECISION

Appearances: Martha Perando, Deer Park, Maryland, pro se; Timothy Biddle, Esq., and Lisa B. Rovin, Esq., with Susan E. Chetlin, Esq., on the brief, Crowell & Moring, Washington, DC, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint by Martha Perando under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging discrimination and discharge by the Mettiki Coal Corporation (Mettiki) in violation of section 105(c)(1) of the Act.[1/]

[1/] Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminat against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject t this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint und or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger o safety or health violation in a coal or other mine or becau such miner, representative of miners or applicant for emplo ment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified o

and that the discriminatory action taken against her was mo
vated in any part by that protected activity. Secretary on
behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786
(1980), rev'd on other grounds sub nom. Consolidation Coal
v. Marshall, 663 F.2d 1211 (3d Cir. 1981). See also Boich
FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transporta
Management Corporation, 462 U.S. 393 (1983), affirming burd
of proof allocations similar to those in the Pasula case.
miner's "work refusal" is protected under section 105(c) of
Act if the miner has a good faith, reasonable belief in the
existence of a hazardous condition. Miller v. FMSHRC, 687
194 (7th Cir. 1982); Secretary on behalf of Robinette v. Un
Castle Coal Co., 3 FMSHRC 803 (1981). Such a "work refusal
may be based upon a perceived hazard arising from the miner
own physical condition or limitations. Bjes v. Consolidati
Coal Co., 6 FMSHRC 1411, 1417 (1984).

As noted in the decision denying Mettiki's motion to
dismiss (8 FMSHRC 364) Ms. Perando first alleges that she
suffered unlawful discrimination when she was given less pa
upon her transfer from underground work to surface laborato
work after Mettiki officials were informed that she could n
longer work underground because of a health impairment,
industrial bronchitis, contracted as a result of her under-
ground work at Mettiki.

In this case I find that Ms. Perando had indeed con-
tracted industrial bronchitis from her exposure to coal dus
while working at the Mettiki underground mine beginning
October 1, 1980. The award to Ms. Perando of Worker's
Compensation based on this claim is not disputed and the
medical evidence of record supports this finding. Because
this medical impairment, in May 1984 two physicians (Drs.
James Raver and Karl E. Schwalum) told Mettiki officials an
Ms. Perando that she could, in effect, no longer work in
Mettiki's underground coal mine and that she should be plac
in a job in which she would not be exposed to coal dust.
More specifically this information was reported in a May 1
1984, letter from Dr. Raver to Mettiki personnel manager
Thomas Gearhart.

In a subsequent letter dated June 25, 1984, and also
received by Gearhart, Dr. Raver again concluded that Ms.
Perando was suffering from industrial bronchitis. He opine

work underground because of the hazard of coal dust exp
to her health. It is not disputed that Ms. Perando accepted
a transfer to the surface laboratory and began working at
that job on September 27, 1985, at a reduced rate of pay.

While it is apparent that Ms. Perando never "refused"
to work underground in the traditional sense, she knew, based
on the medical evidence, that she should no longer work under
ground because of the hazard presented to her from coal dust
exposure and Mettiki knew this too. Thus her medically sub-
stantiated inability to work underground was the functional
equivalent of a work refusal. Since Ms. Perando had been
apprised by her physicians of her medical condition and of
the "disabling" consequences of continued underground work,
her work refusal was also based upon a good faith and reason-
able belief in the hazard.

This refusal was also communicated to the mine operato
by the doctors' reports to Personnel Manager, Thomas Gearhar
Moreover in recognition of the health hazard presented to Ms
Perando by underground work and in apparent recognition of
its obligation to address this danger, Mettiki offered her
the outside job in the laboratory. See Secretary on behalf
of Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983).

By reducing Perando's pay in the laboratory however
(apparently from $520.20 to $383.20 per week), I find that
Mettiki did in fact unlawfully discriminate against her
because of her work refusal.2/ Under the circumstances I
find that Ms. Perando is entitled to damages amounting to th
pay differential between her underground job and her labora-
tory job for the period of her employment in the laboratory.

Ms. Perando next claims that she was discriminatorily
charged with unexcused absences because she filed an applica
tion for Worker's Compensation. She seeks to have all such
unexcused absences expunged from her personnel file. The
record shows that she had received a copy of the Mettiki
employee handbook in August 1984 which included a requiremen
for telephoning the mine office at least one half hour befor
the employee's work shift when reporting in sick. Perando
knew that she was therefore required to call the office by
6:30 a.m. on the days that she was reporting sick and

2/ The fact that Ms. Perando may have failed to formall

she failed to call in as required and she does not therefore dispute the corresponding unexcused absences. She is not however specific in her testimony as to which unexcused absences, if any, remain to be challenged. She has no independent recollection of, nor adequate corroboration for he dates on which she allegedly tried to call in but was unsuccessful and for which she now claims she was charged with unexcused absences. Under the circumstances neither t allegations nor the evidence is sufficient and her complain n this regard must therefore be dismissed.

Ms. Perando alleges, lastly, that she was unlawfully discharged on March 27, 1985, while off work under a doctor care. As explained at the hearings on Mettiki's Motion to Dismiss she is here claiming that she was discharged becaus she had a serious medical condition caused by Mettiki (industrial bronchitis) and that she could not and would no work because of the hazardous health environment presented the laboratory where she had been transferred from her unde ground job. This complaint was also construed as a work refusal in the face of conditions alleged to be hazardous t her health.

As previously indicated Ms. Perando did indeed contra industrial bronchitis from her underground coal mine employ ment and she was thereafter transferred to the surface per- forming work in the Mettiki testing laboratory. She claims that the laboratory environment, even after the installatio of a special ventilation hood, was such that her symptoms o industrial bronchitis returned with "a lot of pain" and "heavy pressure" on her chest accompanied by difficulty in breathing. Between January 21, 1985 and the date of her termination on March 27, 1985, she admitted being absent fr 2 to 5 days a week. Shortly before her termination Ms. Perando told Personnel Manager Gearhart that she did not kn when she would be able to return to work and that she was n then able to work at all. According to Gearhart she was thereafter discharged because she had not reported to work for a significant period of time.

The record shows that coal samples are tested in the Mettiki laboratory as a quality control measure. According to lab supervisor Anne Colaw the moisture, sulfur and ash content of the coal is measured in the lab and its "BTU's a volatility" are determined. According to Colaw the lab was

ober 1, 1984, on samples taken from various parts of the
oratory showed respirable dust ranging from .1 to .3
ligram per cubic meter. Samples taken from the laboratory
March 11, 1985, showed respirable dust ranging from .1 to
nilligram per cubic meter with .4 milligram per cubic
er in the area of the hood. It is not disputed that .1
ligram of respirable dust per cubic meter is equivalent to
amount of dust found in the "ambient air" of a normal
ironment. Indeed Ms. Perando concedes that she knew the
pirable dust levels in the lab were within the "normal
ge."

Considering that Ms. Perando knew that there were no
ormal dust levels in the lab and considering that she had
same alleged symptoms of her illness whether or not she
working in the lab I cannot conclude that her belief that
lab environment was hazardous was either reasonable or
d in good faith. I note moreover that she continued to
e the same symptoms even a year after leaving the
oratory.

Her lack of a good faith belief that the lab presented
azardous health environment is also demonstrated by the
that she wore her respirator only part of the time she
working. In addition her practices became such that
workers could determine in advance when she would not be
king a full day by the fact that she would appear on those
s without her lunch. It may reasonably be inferred from
s practice that she may have been malingering. Under the
cumstances I find that Ms. Perando's alleged inability to
in the lab was not based on either a reasonable or a
d faith belief in a hazardous condition. Her complaint in
regard of discrimination under section 105(c)(1) of the
is accordingly denied.

The complaint herein is thus granted in part and denied
art and further proceedings may be necessary to establish
esponding damages, costs and interest. The parties are
ordingly directed to confer regarding these matters and to
ise the undersigned on or before August 25, 1986, whether
her evidentiary hearings will be required or whether
e matters can be stipulated.

hy Biddle, Esq., and Lisa B. Rovin, Esq., Crowell &
g, 1100 Connecticut Avenue, N.W., Washington, DC 20036
ified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. SE 86-67
	:	A.C. No. 01-01247-0370
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner; R. Stanley Morrow, Esq., and Harold D. Rice, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of three ci penalties filed by the Secretary of Labor against Jim Walter Resources, Inc.

At the hearing the Solicitor advised that the parties proposed to settle the violations for the full assessed amou as follows: Citation 2605565 was issued for a violation of C.F.R. § 75.517 because the power cable from the scoop charg batteries that were being charged on the 010 section, was no insulated adequately and fully protected. The gravity of th violation was serious because a miner contacting the bare, energized conductors could receive a serious electrical shoc In addition, the violation resulted from the operator's negligence. The proposed settlement was for the original as of $800.

Citation No. 2605566 was issued for a violation of 30 § 75.400 because combustible materials were permitted to accumulate at a scoop charging station. The gravity of the violation was serious, because oil, coal and oil-soaked coal permitted to accumulate on the footwall. Power cables were coiled on top of the combustible materials which could have provided an ignition source for the accumulation. A fire co cause a miner in the area to be exposed to smoke inhalation

Citation No. 2605567 was issued for a violation of 3 C.F.R. § 75.512 because the scoop charger on the 010 secti not maintained in a safe operating condition. The violati serious, because the charger had been hit, causing the con panels on each side to be loose, exposing the bare electri components inside the charger. Furthermore, the doors wer damaged and would not close. A miner contacting the bare components could receive a serious electrical shock. The operator was negligent because the violation was obvious. proposed settlement was for $800.

Information was provided regarding the remaining sta criteria set forth in section 110(i).

As I advised operator's counsel at the hearing, the occurrence of three such serious violations on the same da the same mine is a cause for very serious concern. Greate must be taken. If a case such as this involving this oper comes before me in the future I will not approve settlemen even these substantial amounts because it will then be cle even greater deterrence in the form of higher penalties is needed.

Because the recommended settlements are for substant amounts which appear adequately to effectuate the statutor purposes in this instance, said settlements are APPROVED a operator is ORDERED TO PAY $2400 within 30 days from the d this decision.

Paul Merlin
Chief Administratiave Law J

old D. Rice, Esq., R. Stanley Morrow, Esq., Jim Walter
ources, Inc., P.O. Box C-79, Birmingham, AL 35283
rtified Mail)

Gerald Reynolds, Esq., Jim Walter Corp., 1500 Dale Mabry Hwy.
pa, FL 33607 (Certified Mail)

DAN L. THOMPSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 85-77-DM
	:	MSHA Case No. MD 82-27
GILBERT INDUSTRIAL,	:	
Respondent	:	Cyprus Thompson Creek Pro

DECISION DENYING JOINDER

On July 22, 1986, the Complainant filed with this Commission a request for joinder of the Secretary of Labor as a "party-respondent" in this case of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act," and as grounds therefore stated as follows:

> This matter has been allowed to languish, wrongly, for approximately five (5) years. It is only with the intervention of the Commission that MSHA has even nominally been willing to address their statutory responsibility [presumably under section 105(c)(3) of the Act] to resolve this matter. At this juncture, the Complainant simply does not know what it is that the Secretary has done to fairly investigate and/or assess the underlying Complaint herein. Without the inclusion of the Secretary, so as to be subject to service of process, can the Complainant fully present the facts of this matter to the Commission.

FED. R. CIV. P. 19(a) applicable hereto by virtue of Commission Rule 1(b), 29 C.F.R. § 2700.1(b), provides in relevant part as follows:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief can not be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition if the action in his absence may (i) as a pratical matter impare or impede his ability to protect an interest or (ii) leave any of the persons already a party subject o

The Secretary opposes joinder arguing that there are no circumstances under which the exercise of his discretionary function under section 105(c)(3) can constitute discriminati under section 105(c).[1/] Roland v. Secretary of Labor, 7 FMS 630 (1985), aff'd Roland v. Federal Mine Safety and Health Review Commission et al., No. 85-1828 (10th Cir. July 14, 19 Under the present status of law the Secretary's position mus prevail. Under these decisions review of the Secretary's exercise of this function is not permitted regardless of how wrong, negligent or improperly motivated it might be. Accor ingly this Commission could not in any event provide the rel sought by the Complainant against the Secretary. There is therefore no basis for the joinder of the Secretary in this proceeding. Under the circumstances the Motion for Joinder the Secretary as a party-respondent is denied.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

W. Craig James, Esq., Skinner, Fawcett & Mauk, 515 South Sixth Street, P.O. Box 700, Boise, Idaho 83701 (Certified Mail)

Ronald F. Sysak, Esq., Prince, Yeates & Geldzahler, Third Floor Mony Plaza, 424 East Fifth South, Salt Lake City, Utah 84111 (Certified Mail)

Frederick Moncrief, Esq., U.S. Department of Labor, Office o the Solicitor, Suite 400, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

1/ Section 105(c)(3) of the Act provides in part as follows
"Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 da s of notice o

	:	Docket No. WEVA 86-46-R
	:	Citation No. 2703324; 10-1
	:	
	:	Docket No. WEVA 86-98-R
	:	Citation No. 2703528; 1-13-
	:	
v.	:	Docket No. WEVA 86-104-R
	:	Citation No. 2704403; 1-22-
	:	
	:	Docket No. WEVA 86-105-R
CRETARY OF LABOR,	:	Citation No. 2704404; 1-22-
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 86-106-R
Respondent	:	Citation No. 2704405; 1-22-
	:	
	:	Docket No. WEVA 86-107-R
	:	Citation No. 2704406; 1-22-
CRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 86-51
Petitioner	:	A.C. No. 46-03805-03688
	:	
	:	Docket No. WEVA 86-133
	:	A.C. No. 46-03805-03707
	:	
	:	Docket No. WEVA 86-134
	:	A.C. No. 46-03805-03708
v.	:	
	:	Docket No. WEVA 86-199
	:	A.C. No. 46-03805-03712
UTHERN OHIO COAL COMPANY,	:	
Respondent	:	Martinka No. 1 Mine

DECISION

pearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for Respondent/Petitioner;
David A. Laing, Esq., and Mark S. Stemm, Esq., Southern Ohio Coal Company, Columbus, OH, for Contestant/Respondent

fore: Judge Fauver

Labor, and petitions by the Secretary, under section 110(i) of the Act, for civil penalties for the violations alleged in the six citations.

The basic issue is whether water pumps specified in th citations are "permanent pumps" within the meaning of 30 C.F.R. § 75.1105. If they are permanent pumps, the safety standard requires that they be contained in fireproof housi and that they be air-vented into a return entry of the mine It is acknowledged that they were not so housed and vented at the time the citations were issued. Other issues raised are:

1. Whether the reference to "permanent pumps" in 30 C.F.R. § 75.1105 is unconstitutionally vague

2. Whether MSHA's actions with respect to the interpretation and enforcement of 30 C.F.R. § 75.1105 have denied SOCCO due process.

3. Whether the water pump violations, if any, were "significant and substantial" within the meaning of § 104(d) of the Act.

Having considered the evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. Citation No. 2703324 was issued October 16, 1985, when MSHA Inspector John Paul Phillips observed that the ai current used to ventilate a booster pump was not vented directly into the return. The pump was a 20 Horsepower T & T fresh water pump located at the No. 9 stopping inby. The pump was reasonably expected to be in this location at leas one year.

2. Citation No. 2703528 was issued January 13, 1986, when Inspector Phillips observed that a gathering pump was not housed in a fireproof enclosure or area with the air current coursed directly into the return. The pump was a 1 Horsepower T & T 250 volt direct current pump located at No 9 stopping in the track heading of the No. 13 left section. The pum had been in this location abou a r d a half

pump was not coursed directly into the return. The pump a 20 Horsepower T & T fresh water pump located at No. 6 pping. The pump had been in this location at least one .

4. Citation No. 2704404 was issued January 22, 1986, n he observed that a gathering pump was not housed in a eproof structure with the air current coursed directly o the return. The pump was a 10 Horsepower T & T direct rent pump located at No. 50 Block, 1 East Track. The had been in this location for about three to five rs.

5. Citation No. 2704405 was issued January 22, 1986, n he observed a gathering pump not installed in a fireproof a with the air current vented directly into the return. pump was a 10 Horsepower T & T direct current pump ited at the No. 9 stopping in the No. 3 Butt Section. pump had been in this location at least one year.

6. Citation No. 2704406 was issued January 22, 1986, n he observed a gathering pump not housed in a fireproof cture with the air current vented directly into the irn. The pump was a 10 Horsepower T & T pump located at 21 stopping in the No. 3 Butt Section. The pump had in this location for at least one year.

7. None of the pumps cited was in a working section. did the pumps advance with any working section.

8. Given the length of time at each location, and each o's function and expected use, long-term installation and of each pump were clearly established by the evidence.

Booster Pumps

9. The function of a booster pump is to boost the er pressure at the working faces in the working sections y the pump. There are 10 booster pumps in the mine. At time of hearing, all were located in the track haulage ry outby the working sections. Booster pumps generally y in the same location until the sections served by them driven up and pulled back on retreat. They are usually the same place at least one year.

Gathering Pumps

10. The function of a gathering (or "dewatering") pump is to pump water from local swags along the track or in the intake entry, and discharge the water into the main reservoir or into a main sump area. There are 39 gathering pumps at the mine. At the time of hearing, each was located in the track entry, outby the working sections. A gathering pump usually stays in the same place until an inby section is driven up and the longwall goes in and retreats to the area where the pump is located; then the pump is moved. They usually stay in the same place for at least one year.

DISCUSSION WITH FURTHER FINDINGS

The essential facts are not in dispute. Inspector John Paul Phillips, an electrical inspector out of MSHA's Morgantown, West Virginia, District Office, began an electrical inspection at Martinka in October, 1985. Inspector Phillips issued six § 104(a) citations for violations of 30 C.F.R. § 1105 between October 16, 1985, and January 22, 1986.

Inspector Phillips issued Citation Nos. 2703324 and 704403 when he observed that two 20 Horsepower fresh water "booster" pumps were not housed in fireproof structures and the air currents used to ventilate the pumps were not coursed directly into the return. Citation Nos. 270328, 2704404, 704405, and 2704406 were issued when he observed that four 10 Horsepower "gathering" pumps were not housed in fireproof structures and air currents ventilating the pumps were not coursed directly into the return. None of the pumps involved in these citations was located in a working section. Nor did any of the pumps advance with any working section.

Morgantown District Office. After several of the citati involved here were issued, it became apparent that a dif in policy existed between the District and the Subdistri Offices regarding the citation of permanent pumps for a violation of § 1105. At least one inspector from the Fa Office, Charles Thomas, who was the regular inspector at Martinka, operated under a "visibility standard" in citi permanent pumps for § 1105 violations. Under this appro pumps located in frequently traveled areas or in track haulage entries were not cited for violations of § 1105. Permanent pumps in more isolated areas were cited.

Inspector Thomas' approach was at odds with Distric and National Office policy, which subjects all pumps to requirements if they meet the definition of a "permanent electrical installation as contained in the following pa of MSHA's Underground Inspection Manual p. II-471 (March 1978):

POLICY

A permanent electrical installation is electric equipment that is expected to remain in place for a relatively long or indefinite period of time.

Consequently, the following electric equipment should be considered permanently installed:

All rectifiers, transformers, high-voltage switchgear and battery chargers which are not located on and advanced with the working section; rotary converters; motor-generator sets; belt drivers; compressors; pumps (except those excluded below) and other similar units of electric equipment.

The following electric equipment should not be considered permanently installed:

> Electric equipment which is frequently moved and advanced with the working section, self-propelled electric equipment, portable pumps and portable rock dusters which are regularly moved from one location in the mine to another, and similar electric equipment. (Emphasis supplied.)

All of the cited pumps meet the Manual definition of a permanent installation. They were not located in working sections and did not advance with working sections. They did not regularly move from one location in the mine to another. When installed they were expected to remain in place for a relatively long or indefinite period.

The citations allege a violation of 30 C.F.R. § 75.110 which is a verbatim restatement of § 311(c) of the Act:

> Underground transformer stations, battery-charging stations, substations, compressor stations, shops and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fire-proof construction. (Emphasis supplied.)

The term "permanent pump" is not specifically defined in the Act or Regulation. Section 311(c) of the Act and § 1105 of the Regulations were contained in the earlier Act o 1969. Permanent pumps were not specifically defined there either. Neither legislative history nor case law is helpfu on the issue of what constitutes a permanent pump. It is clear, however, that the purpose of § 1105 is to protect miners against fire and smoke inhalation. It is part of a larger section dealing with fire protection in coal mines. This purpose coupled with the broad language of the standar leads to the conclusion that the standard is meant to have broad reach to effectuate the purposes of the standard and the Act.

contained in the MSHA Underground Manual quoted above. The Manual has been in effect since its publication in March 1978.

Respondent contends that use of the term "permanent pump" in the standard is unconstitutionally vague and overb In order to be constitutional, a standard must not be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. Gerald Cons 269 U.S. 385, 391 (1926). Rather, "Laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109 (1972).

A standard is not unenforceably vague if a reasonably prudent person familiar with the mining industry and protec purposes of the standard would recognize the hazardous condition which the standard seeks to prevent. Secretary v Ozark-Mahoning Co., 3 FMSHRC 2117, 2118 (1986); Secretary v U.S. Steel, 3 FMSHRC 1550, 1533 (1984). "Broadness is not always a fatal defect in a safety and health standard." Secretary v. Alabama By-Products Corp., 2 FMSHRC 1918, 192((1982) Many standards must be drafted in general terms "to be broadly adaptable to myrad circumstances" in a mine. Secretary v. Kerr-McGee Corp., 2 FMSHRC 1492, 1493 (1981).

In two cases involving a safety belt standard, the Commission rejected the operators' arguments that 30 C.F.R § 55.15-5 was unconstitutionally vague and ambiguous. Secretary v. U.S Steel, 3 FMSHARC 1550 (1984); Secretary v Great Western Electric, 2 FMSHRC 2121 (1983). That stand requires that safety belts and lines be worn by miners whe there is a "danger of falling." The operators objected on the grounds that the standard's phrase "danger of falling" was too vague and ambiguous to enable an operator to defin all situations where belts and lines must be worn. The Commission ruled, however, that application of a broad standard to particular factual situations did not offend d process. Sufficient clarity may be provided if an alleged violation is judged by a test of what actions would have been taken under the same or similar circumstances by a

FMSHRC at 1553; 2 FMSHRC at 2122. The Commission noted tha
the specific purpose of § 57.15-5 is the prevention of
falls. It ruled that by requiring positive means of prote
whenever any danger of falling exists, the standard reason
achieved its purpose of protecting all miners. Applying
this rationale to the instant cases, I conclude that it is
reasonable to apply § 75.1105 to a booster or gathering pu
expected to remain in place for a long or an indefinite
period outby a working section or sections.

Respondent further argues that the Manual definition
"permanent" violates the Administrative Procedure Act (5
U.S.C. § 553). Section 101(a) of the 1977 Mine Act (30
U.S.C. § 811(a)) requires all rules concerning mandatory
health or safety standards to be promulgated in accordance
with § 553 of the A.P.A. Further, § 101(a)(2) requires th
Secretary to publish in the Federal Register any "proposed
rule promulgating, modifying, or revoking a mandatory heal
or safety standard" and to permit public comment on the
proposed regulation. Therefore, there would be a violatio
of the A.P.A. if the Manual policy were more than an inter
or general statement of policy. However, I find that the
definition is a general policy statement of MSHA's interpr
of "permanent." It is not subject to the A.P.A.'s notice
and comment requirements.

Respondent also contends that the conflicting enforce
policies of MSHA's District (Morgantown) and Subdistrict
(Fairmont) Offices will result in a denial of due process
if MSHA is permitted to charge a violation in these cases.

It is clear from the record that it is MSHA's officia
policy to follow the Manual definition of permanent electr
installations in determining whether a particular pump is
"permanent." This approach is followed by the Morgantown
District Office, as stated by Inspector John Paul Phillips
and Electrical Supervisor Mike Hall. In addition, Gene
Fuller, Safety Specialist from the MSHA National Office,
testified that this is a nationwide enforcement policy.

finition in these cases. Respondent has had a copy of e 1978 Manual for many years. It was put on notice by spector Phillips' discussion and subsequent citations in ptember, 1985, that the Manual definition would be enforced Respondent's mine. The citations at issue in these cases re issued a month after such notice by Inspector Phillips.

The policy previously applied by the Fairmont Subdistrict fice was unauthorized and was contrary to national policy shown by the Manual, which provides that "The guidelines this chapter supersede all previous instructions as of bruary 1, 1978, relating to the same subject category." e situation was corrected by the District manager upon arning of the conflict. All subdistrict supervisors and rsonnel have been brought into line with National Office licy.

In Secretary of Labor v. King Knob Coal Company, Inc., FMSHRC 1417, 1422 (1981), the Commission stated:

> ...[An] estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the penalty....

Even in those cases where the courts have recognized an toppel defense, it has been held that estoppel does not ply "if the government's misconduct [does not] threaten to rk serious injustice and if the public's interest would...be duly damaged by the imposition of estoppel." King Knob, 3 SHRC at 1422, quoting United States v. Lazy F.C. Ranch, l F.2d, 985, 989 (9th Cir. 1973). In view of the availabil penalty mitigation as an avenue of equitable relief, nding an operator liable would not work such a "profound d unconscionable injury" that estoppel should be invoked. ng Knob, 3 FMSHRC at 1422.

In order to be considered a "significant and su stantial

the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

Under this test, a "significant and substantial" findi turns on whether a reasonable likelihood of harm exists due to the violation. The inspector issued the citations when he observed that the pumps were not housed in fireproof structures with the air currents vented directly into the return. All six pumps were in working order and had energi circuits at the time the condition was cited. The inspecto testified that any of the equipment could wear out, motors could fail or short circuit. Events of this nature could happen with electrical equipment after any length of time. He stated that if a pump got hot, it could ignite the coal or any combustible materials around it. He also stated tha in his opinion, "even smoke from insulation in the pump, when they fail, could ignite or cause fumes that would be harmful to employees" (Tr. 30).

MSHA Electrical Supervisor Hall also testified as to similar hazards presented by failing to house and vent the pumps.

The Commission emphasized in National Gypsum that the inspector's "independent judgment is an important element i making 'significant and substantial' findings, which should not be circumvented." 3 FMSHRC at 825-826. The inspector' conclusions in this case were based on his observations of unhoused and unvented pumps and the number of employees who would have been affected by fire or smoke moving into the working sections. The inspector made a careful assessment of the conditions he observed and concluded that the hazard was reasonably foreseeable or reasonably likely. I credit his expert opinion on these matters, and find that the violations were "significant and substantial" within the meaning of section 104(d) of the Act.

policies at its Morgantown District and Fairmont Subdistric Offices. I find this to be a substantial mitigation of the violations, and conclude that a civil penalty of $10 for ea violation is appropriate.

CONCLUSIONS OF LAW

1. The Commission's administrative law judge has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.1105 as alleged in Citations Nos. 2703324, 2703528, 2704403, 2704404, 2704 and 2704406.

3. Respondent is ASSESSED a civil penalty of $10 for each of the above six violations.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citations Nos. 2703324, 2703528, 2704403, 2704404, 2704405, and 2704406 are AFFIRMED.

2. Respondent shall pay the above civil penalties in the total amount of $60 within 30 days of this decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

David A. Laing, Esq., Alexander, Ebinger, Fisher McAlister Lawrence, 1 Riverside Plaza, 25th Floor, Columbus, OH 4321 2388 (Certified Mail)

Matthew J. Rieder, Esq., and Susan M. Jordon, Esq., Office of the Solicitor, U.S. Oepartment of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 191 (Certified Mail)

AUG 19 1986

FRED O. W. ARNTZ, Complainant	:	DISCRIMINATION PROCEEDI
	:	Docket No. SE 86-47-DM
v.	:	
	:	MD 85-56
METRIC CONSTRUCTORS, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On August 14, 1986, Complainant filed a motion to dis this proceeding because of a settlement of his discriminat complaint against Respondent for the payment to Complainan of $3500.

Therefore, it is ORDERED that the motion is GRANTED, proceeding is DISMISSED and the hearing scheduled for Augu 1986 is CANCELLED.

James A. Broderick
Administrative Law Judge

Distribution:

Ronald S. Webster, Esq., Whittaker, Stump & Webster, P.A., P.O. Box 531126, Orlando, FL 32853 (Certified Mail)

Dwane E. Vickstrom, Esq., The Jones Group, One South Execu Park, 6060 St. Albans St., Charlotte, NC 28287 (Certified

Mr. Fred O. W. Arntz, 4292 Azora Road, Springhill, FL 3352 (Certified Mail)

slk

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PRC
	:	Docket No. SE 86-
	:	A. C. No. 09-0026
v.	:	
	:	Junction City Mir
BROWN BROTHERS SAND COMPANY, Respondent	:	
	:	

DECISION

Appearances: Ken S. Welsch, Esq., Office of the So
U. S. Department of Labor, Atlanta, G
for the Petitioner
Messrs Carl Brown, Steve Brown, and C
Brown, Howard, Georgia, for the Respo

Before: Judge Kennedy

This matter came on for a hearing in Columbus,
in June 1986. The parties' stipulations as to juris
size, prior violations, ability to pay, and abatemer
part of the record. Four of the seven violations ch
were cited for insignificant and insubstantial condi
At the conclusion of the presentation of evidence as
violation the trial judge entered a tentative bench
As a result five of the seven violations were dismis
including one S&S violation. Of the two remaining v
one was reduced from S&S to non-S&S and the other wa
affirmed.

After receipt of the transcript the parties wer
an opportunity to file post-hearing briefs challengi
tentative bench decisions.

Based on a review of the evidence in the record
ered as a whole, I find each of the tentative decisi
should be, and hereby is, CONFIRMED for the reasons
in the transcript and as supplemented below.

Citation No. 2007655

cracked right through the windshield from top to bottom. Elaborating in response to questions from the bench, the inspector testified that the windshield measured 34 by abo 36 inches; that the "entire windshield," some 1,224 square inches, was spider-webbed cracked on both sides starting f the upper left corner, which had a hole in it, and spread throughout the windshield down to the "weather seal" at th bottom. The inspector said the condition of the windshiel made "vision--visibility bad for the operator, especially when he got glare from the sun."

The inspector testified he understood the requirement that the safety glass be in "good condition" to mean that "be free of cracks and broken glass . . . and kept clean." As far as the hole was concerned he felt that was not a "problem" but that the spider-web cracks were because they obstructed the operator's vision. Despite this, the inspector did not consider the condition hazardous because was a "small operation, and there's very little foot traff around, and what he's doing is doing clean-up work and loading trucks." The inspector said that in his judgment the likelihood of injury to an employee was "minor" and "remote."

In response to further questions from the bench, the inspector said that he considers a windshield to be in "go condition" if "you have little cracks in the corner and so forth that doesn't obstruct the vision" and in "excellent" condition if it has "no cracks at all and it be kept clean and no cracks or no cloudiness from the sun from age." Th inspector said he felt this windshield was below par for "good" because the spider-web cracks throughout the glass obstructed vision and created "eyestrain" and "glare" from the reflection of light through the cracked glass.

The inspector's description was at almost totally variance with the facts. At the time the inspector testi neither he nor his lawyer knew the operator had a picture the windshield in question taken shortly after the citatio was written and before it was replaced. He was shown this picture on cross examination but said he could not identi it because it did not show a "hole" in the "upper left corner." In its rebuttal case, the operator conclusively established that the picture of the windshield in the 644 loader (OX-6) had no "hole" in the "upper left corner," in

Mr. Gregg Brown, the foreman, who took the photograph testified he was very familiar with the 644-B loader; that the crack on that glass was "right in the middle of the windshield" but that there was no "hole" in the windshield; that the windshield was not cracked through and that when seated in the vehicle the large crack "in the middle" was above the operator's line of vision. He further testified that if the crack had obstructed the operator's line of vision he would have replaced it. Mr. Lucas, a loader operator, testified the cracks in the glass did not interfere with his operation of the machine.

Despite the fact that all the witnesses agreed that whatever impairment of vision existed did not make operation of the loader unsafe, the Solicitor argued and continues to argue that the "slightest impairment of vision" means the glass is not in "good condition" and constitutes per se a non-S&S violation. In his post-hearing brief, the Solicitor also asserts that "good condition" clearly implies an unbroken window. Since the undisputed evidence from the photograph (OX-6) and the testimony of the operator's witnesses conclusively show that the windshield in the 644-B loader, while cracked, was not "broken," the Solicitor's argument is obviously fatally flawed.

I find that as properly interpreted the standard was intended to promote safety not the sale of safety glass. Since the hazard against which the standard was directed, likelihood of injury to the loader operator or foot traffic did not exist, I conclude the condition of this windshield was "good" and that the violation charged did not, therefor occur.

Citation No. 2521743

On the same date as the previous citation a John Deere 644-C front-end loader was also cited for a non-S&S violation of 30 CFR 56.9-11. Inspector Grabner's 104(a) citation charged the windshield was "broken 'spider-web crack.'" In his testimony he described the windshield as "spider-webbed cracked the entire length of the windshield, from side to side, and from height to width." He further testified that the loader was being used to "push material into the surge pile" and to "clean up and load trucks." He said it was his observation that the "visibility of the operator to see

traffic in the area of people around it." When shown the t photos of the windshields (OX-5 and OX-6) on cross examination, the inspector could not identify the windshield he wa testifying about.

In response to questions from the bench, the inspector contradicted his earlier testimony and said that while the condition of the windshield did not make it unsafe to opera the loader, "the condition of the windshield made it difficult for the operator to have good, clear vision out the front of the machine." Nevertheless, the inspector affirme that "even with the amount of spider-webbing we had here," did not consider it unsafe to operate the loader.

Once again it was difficult to credit the inspector's description of the condition because the contemporaneous photograph of the windshield, made within a month after the citation was written, shows the only cracking or spider-webbing was in the upper left quadrant and that there was n cracking or spider-webbing in the lower half of the windshield (OX-5). Mr. Gregg Brown, who took the photo, testif the picture showed essentially the same condition that exis on July 19 and that "it didn't continue to shoot spider cracks every which-a-way, no sir. It reached certain--say side to side, and then it stopped." He further testified that after impact the glass did not shatter, that there was no broken glass, and that there was no "hole in either one the windshields."

Mr. Gregg Brown, the operator's foreman and a part own of the business, said it was the operator's policy to repla any windshield that had been hit and cracked in the middle as to obstruct the operator's line of vision. Mr. Brown sa he did not consider the 644-C windshield needed replacing because "There's still fifty percent or more of that windshield that is not obstructed, and I did not feel that his line of vision was impaired." On cross examination, Mr. Br pointed out that while the vision of an operator who had to look through the upper left quadrant to load a truck might have some impairment there was a side window through which could also look to align his vehicle. He also said the loaders were seldom used to load the trucks as they usually loaded off the conveyor belt.

Counsel for the Secretary argued that the test he appl

extreme contention was contradicted by the testimony of both inspectors as well as the operator's witnesses.

Since I cannot agree that the standard "good," a comparative term, can properly be interpreted as "perfect" or that de minimis likelihood of injury mandates the compulsory replacement of windshields with insignificant cracks I must once again reject the solicitor's interpretation and find the violation charged did not, in fact, occur.

Citation Nos. 2521413 and 2521414

On September 4, 1985, two inspectors returned to the operator's plant to check on the abatement of the windshield violations and to continue the regular inspection begun in July. At that time Inspector Manis wrote two 104(a) citations, the first being non-S&S and the second S&S.

The citations charged a violation of the guarding standard, 30 CFR 56.12-23. More specifically, they charged that at the No. 2 and 3 pumps there were four unguarded openings that exposed uninsulated inter electrical parts carrying 220 volts to possible contact. (Exhibits 1A, B, C, and D; 3A, C, and D; PX-6 and 8). It was further alleged that these openings were not guarded by location and that at the No. 2 pump the area was wet and an operator was in the area. These charges collapsed when the operator produced a vido tape, witnesses and expert testimony which showed that there was electrical voltage in the connections cited within six to eight seconds after the motors were started. (Tr. 112-113, 167).

Since there was no recognizable electrical shock hazard I found the violations did not, in fact, occur. In his post hearing brief, counsel appears to concede this but claims the issue now to be decided is "whether the openings were protected by location." Since I find there was no hazard to be guarded against, I also find the question of whether the openings were guarded by location is moot.

Citation No. 2521467

During the inspection of September 4, 1985, Inspector Grabner observed that a grounding wire for the control panel for the pole mounted 220 volt electrical disconnect switch

considered S&S because the operator [illegible]
off and on several times a day.

Respondent did not deny that the condition alleged existed but attempted to show there was another power that went back to the substation through an undergroun The only photograph of the location, however, clearly only three, not four, wires coming from the substation (PX-10). In the absence of a showing that a power gro wire was connected to the disconnect switch, I found t violation did, in fact, occur and that it was signific substantial. The gravity was, of course, serious but gence was only modest. After considering the other cr I found, and affirm, that the amount of the penalty wa is that proposed, namely, $126.

Citation No. 2521468

On September 4, 1985, Inspector Grabner also obse single unguarded 110 volt incandescent light bulb in t surge tunnel. Usually, the tunnel was lit by floresce lighting located above the conveyor belt. The light b temporary until the florescent lighting in the area co repaired. The tunnel was about 5 feet, 6 inches high light bulb was suspended approximately 5 feet, 3 inche the walkway. Miners passing through the tunnel would bend forward to walk through the tunnel and under or a the light bulb. The inspector wrote a 104(a), S&S cit charging a violation of 30 CFR 56.12-34 for failure to the light bulb. The inspector considered the violatio because he belived that the bulb could easily be struc miners traveling the area and that such contact could possibly have caused "burns, shock or cuts from broken A penalty of $126 was proposed.

There was no dispute about the existence of the c tion charged. Respondent offered a video tape of the which lent support to its argument that the bulb was l to the side of the walkway, not directly above it. I preponderance of the evidence showed the bulb was in s ciently close proximity to the walkway that it could b struck by an individual passing through but that the l hood of a burn, shock or cut from broken glass was so speculative, and unlikely that the S&S finding must be vacated. This was predicated on the fact that miners rough the area would be wearing hard [illegible]

Accordingly, I affirm my finding that the violation charged did, in fact, occur, that it was not serious, th the negligence was slight and that, after considering th other criteria, the amount of the penalty warranted shou reduced from $126 to $10.

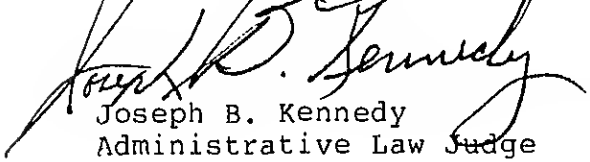
Citation No. 2521469

While Inspector Manis was writing his citation for alleged failure to guard the electrical connections on t No. 3 pump motor, Inspector Grabner wrote his third cita of the day. This stemmed from his observation of an all unguarded keyway on a 10 1/2 inch long shaft that protru from the No. 3 motor some 43 inches off the motor platfo It was not claimed that the shaft itself was a hazard bu that the keyway which was cut into the shaft to some uns fied depth might, because it was rusted and rough, catch entangle someone's clothing and possibly strangle them (PX-13). Because this was unlikely Inspector Grabner wr only a 104(a), non-S&S citation for which a $20 penalty proposed.

The evidence showed that because of its location th likelihood of anyone coming into contact with the keyway while the motor was running was extremely remote, if not entirely speculative. Only a maintenance man regularly near the shaft and then only when the motor was turned c Anyone else wishing to approach the shaft would have to an 8 to 10 foot high stairway, step over a large dischar pipe, and other obstacles and make several sharp turns t even get near it. Even so there was no pinch point and likelihood of a piece of clothing from a man's waist or becoming so entangled in the open keyway in such a way a inflict an injury, let alone strangulation, was so inexplicable as to defy description or belief. In fact, inspector admitted he found the violation to be non-S&S because it was unlikely to cause injury to anyone (Tr. 2 For these reasons, I found the violation charged did not fact, occur. I see no reason to change that determinati

The premises considered, therefore, it is ORDERED:

1. That for the two violations found the oper pay a penalty of $136 on or before Friday,



Joseph B. Kennedy
Administrative Law Judge

Distribution:

Ken Welsch, Esq., Office of the Solicitor, U. S. Department of Labor, 1371 Peachtree Street, N.E., Room 339, Atlanta, GA 30367 (Certified Mail)

Mr. Carl Brown, Brown Brothers Sand Company, P. O. Box 32, Howard, GA 31039 (Certified Mail)

dcp

FRANK McCOART, Complainant	:	DISCRIMINATION PROCEEDI
	:	Docket No. KENT 86-63-I
v.	:	CD 86-05
ELM COAL COMPANY, Respondent	:	No. 2 UG Mine

DECISION APPROVING SETTLEMENT

Appearances: Frank McCoart, Van Lear, Kentucky, pro se; Michael J. Schmitt, Esq., Wells, Porter, Schmitt & Walker, Paintsville, Kentucky, for Respondent.

Before: Judge Maurer

Statement of the Case

This is a discrimination proceeding initiated by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, charging the respondent with unlawful discrimination against Mr. McCoart for exercising certain rights afforde him under the Act. A hearing in this matter was convened in Prestonsburg, Kentucky, on August 5, 1986. After commencing his case-in-chief, Mr. McCoart moved for a continuance so that he might obtain counsel to assist him in preparing and presenting his claim. I granted this motio over objection of respondent's counsel and the hearing wa continued at that point.

Subsequently, the parties have jointly proposed a settlement by a written motion to approve settlement file on August 8, 1986. That proposal contemplates a dismissa of the complainant's claim against the respondent with prejudice upon the following terms and conditions:

> (1) The respondent shall and has purged the complainant's personnel file of all reprimands, warnings and disciplinary actions so that such records will not reflect adversely upon the complainant and inhibit his ability to obtain future employment as a coal miner.

in complete and total settlement of all of complainant's claims for monetary relief (backpay), for reinstatement and for all claims whatsoever.

Conclusion

After careful review and consideration of the settleme terms and conditions proposed by the parties in this proceeding, I conclude and find that it reflects a reasonable resolution of the complaint. Further, since it seems clear to me that all the parties, including Mr. McCoart personall are in accord with the agreed upon disposition of the complaint, I see no reason why it should not be approved.

ORDER

The proposed settlement is APPROVED. Respondent IS ORDERED AND DIRECTED to fully comply with the terms of the agreement. Upon full and complete compliance with the terms of the agreement, this matter is DISMISSED.

Roy J. Maurer
Administrative Law Judge

Distribution:

Frank McCoart, General Delivery, Van Lear, KY 41265 (Certified Mail)

Michael J. Schmitt, Esq., Wells, Porter, Schmitt & Walker, P. O. Box 1179, Paintsville, KY 41240 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEE
	:	Docket No. SE 86-57
	:	A. C. No. 01-01247-0
v.	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Soli U. S. Department of Labor, Birmingham, A for Petitioner; R. Stanley Morrow, Esq., Harold D. Rice, Esq., Birmingham, Alabam Respondent.

Before: Judge Merlin

This case is a petition for the assessment of two penalties filed by the Secretary of Labor against Jim W Resources, Inc. It was heard as scheduled on August 5,

In accordance with their pre-hearing statements an hearing the parties agreed to the following stipulation

1. the operator is the owner and operator of the mine;

2. the operator and the mine are subject to the p and jurisdiction of the Federal Mine Safety and Health 1977;

3. I have jurisdiction in this case;

4. the MSHA inspector who issued the subject cita orders was and is a duly authorized representative of t Secretary;

ability to do business;

7. the operator is medium in size;

8. the operator's prior history of violations is

At the outset of the hearing the Solicitor and op counsel moved for approval of a settlement in the amou for Citation No. 2604923 which had been issued for a v 30 C.F.R. § 75.1707 because an intake escapeway was no from the belt haulage entry. A two foot by four foot block had been knocked out of the permanent stopping l behind the power center. The violation was serious bu negligence was less than originally thought because th had had the stopping replaced once but it had fallen o The proposed settlement of $150 was approved.

Citation No. 2604926 was issued for a violation o 30 C.F.R. § 75.400 because a deposit of coal dust and had been allowed to accumulate in the cross-cut where trac charger was located on the No. 2 longwall section mately 23 hours later, Order No. 2604928 was issued pu section 104(b) of the Act because an inadequate effort made to clean up the accumulation. At the conclusion inspector's testimony a recess was taken after which t proposed a settlement based upon the following additio lations: the operator was negligent; there was not the good faith abatement with respect to the original cita there was good faith abatement with respect to the ord violation was serious but gravity was substantially le originally thought because there was no ignition sourc section due to a breakdown of the machinery. The prop ment of $450 was approved. In view of the testimony, encouraged to acquaint their witnesses with the applic definition of "significant and substantial" as set for Commission decisions.

ORDER

It is ORDERED that the operator pay $600 within 3 date of this decision.

asor, Suite 201, 2019 Second Avenue North, Birmingham, AL
3 (Certified Mail)

tanley Morrow, Esq., Jim Walter Resources, Inc., Post Offic
C-79, Birmingham, AL 35283 (Certified Mail)

ld D. Rice, Esq., Jim Walter Resources, Inc., Post Office B
, Birmingham, AL 35283 (Certified Mail)

erald Reynolds, Esq., Jim Walter Corporation, P. O. Box
1, Tampa, FL 33622 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 85-140- A. C. No. 15-00112-0550
v.	:	Clover Bottom Undergrou
M. A. WALKER COMPANY, INC., Respondent	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor U.S. Department of Labor, Nashville, Tennes for Petitioner;
Lyle A. Walker, President, M. A. Walker Com Inc., McKee, Kentucky, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to sectio 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," charging the M. A. Walker Company, Inc. (Walker) with three violations of reg ulatory standards. The issues before me are whether Walke has committed the violations as alleged and, if so, whethe those violations were of such a nature as could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, i.e., whether th violations were "significant and substantial". If violations are found, it will also be necessary to determine th appropriate civil penalty to be assessed in accordance wit the criteria set forth in section 110(i) of the Act. Pursuant to notice, the case was heard in Berea, Kentucky, on June 24, 1986.

Citation No. 2247898 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.3022 and charges as follows:

> Ground conditions along haulageways and travelways was not scaled. This include the three entries to the mine. Loose rock and frozen

Inspector Kenneth Ruffner of the Federal Mine Safety and Health Administration (MSHA) performed an inspection at the Clover Bottom limestone mine on January 30, 1985, when he discovered the aforementioned condition. This condition is more fully described in a technical report authored by Mr. Richard R. Pulse, a geologist also employed by MSHA (Secretary's Exhibit No. 4). Depicted therein are photographs of areas where loose rock slabs and rock overhangs are present above and adjacent to the north, one-way portal and the middle, two-way portal. Mr. Pulse reports that many of these rocks are loosely keyed into the rock walls and separated or detached rock slabs were observed to be resting upon steeply inclined weathered shale slopes. In his opinion, all of these could potentially slide or fall into the mine roadway or into the portal entrances. The report and the photographs contained therein document the existence of numerous loose slabs of limestone resting upon steep slopes above the portals and rocks loosely keyed into place, above and adjacent to the access road and mine portals. In the opinion of this geologist, it has taken decades for this condition to develop, but these rocks constitute a present danger to people entering the portals especially during periods of heavy rain or during cycles of freezing and thawing.

Inspector Vernon Denton also testified concerning the loose rock he observed at the two aforementioned portals. He stated that it appeared to be all different sizes--from the size of a bowling ball to something approaching table size, including a large slab of rock about six (6) feet long, three (3) feet wide, and a foot thick.

The respondent's witness, Mr. James Denham, testified of the extreme difficulty he had removing the rocks that MSHA demanded be removed to abate the citation. For example he broke a 3/4 inch cable trying to pull one of the rocks down that MSHA claimed was loose.

On the issue of whether loose rock existed along the haulageways and travelways in the area of these two portals I must make a credibility choice. Two mine inspectors are of the definite opinion that loose rocks existed in these areas and their opinion is buttressed by the report of a geologist who likewise concluded that numerous loose slabs

the mine superintendent who essentially testified that be-
cause the rocks were difficult to pull down, in his opinion
they would not have fallen down, I must make the credibilit
finding in favor of the Secretary, and thus find a violatio
of the cited standard.

Under the circumstances herein, I find that it was reasonably likely that the aforementioned loose rock could fall down at any time, and if one of these large rocks that the Secretary maintains was loose fell, it would be reasonably likely that it could fall on one of the vehicles, including customer's trucks, that go into and out of the mine and crush it. I therefore find that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). Furthermore, it i undisputed that mine management knew of the condition prior to the citation being issued. They just didn't believe tha it was a condition that needed correction. I disagree and find that their negligence was "high" as cited by the inspector.

Citation No. 2247378 was also issued on March 5, 1985, by Inspector Ruffner and alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.9003 and charges as follows:

No. 2 Euclid haul truck did not have any brakes.

According to Inspector Ruffner, he overheard a conversation between the men working at the Clover Bottom Mine that there were no brakes on at least one of the trucks being used in the mine and that there was a danger of colliding with one of the customer's trucks while they were going in and out hauling from the stockpile. He asked the safety director to let him test the brakes on the No. 1 and 2 trucks, which he did. When he tested the No. 2 truck, by having the driver accelerate the truck over a predetermined distance and then apply the brakes, he found it to have no brakes, caused in his opinion by running through water under the stockpile bins which was deep enough to reach the brake drums.

The record establishes that this truck was being operated in a fairly congested area with brakes that were rendered useless for all practical purposes. Therefore,

moderate negligence because, at a minimum, it is chargeable with negligent training and supervision for the failure of its employees to correct this condition. I also note that the violation was abated by simply drying out the brakes. No other repair was required. Before leaving this subject, I specifically reject the operator's argument that the emergency brake or parking brake being in an operable condition is sufficient to satisfy the regulatory requirement that "[p]owered mobile equipment shall be provided with adequate brakes."

Citation No. 2247379 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.9053 and charges as follows:

> Water was allowed to accumulate which created a hazard to moving equipment.

The cited standard requires that water which creates a hazard to moving equipment be removed.

According to the undisputed testimony of Inspector Ruffner, who likewise issued this citation on March 5, 1985, after he had issued Citation No. 2247378 concerning the truck with no brakes, the operator continued to load the other haul truck in the water which existed in the stockpile bin area. The danger according to the inspector being that the brakes would get wet and suffer the same consequences as they had on the No. 2 haul truck, which had been written up two hours earlier. Under the circumstances as before, if a vehicle was operating in a congested area with no brakes, an accident was reasonably likely to occur resulting in disabling or even fatal injuries. Accordingly I find the violation to be "significant and substantial." Mathies, supra.

On the issue of negligence, the water had been in the area under the stockpile bins that morning because of a drain being stopped up. Respondent produced testimony that this was the first time this drain had ever backed up. In order to abate the citation, they pumped the water out and then opened the drain. I concur with the inspector that the operator is certainly chargeable with the knowledge that the water was there at the time it existed, and of the consequences of operating haul trucks in the w[illegible]e. I

In determining the amount of penalties I am assessing this case, I have given great weight to the fact that Walk is a small operator, has a relatively minor history of reported violations and abated the violative conditions in a timely manner. Accordingly, the following civil penalties are deemed appropriate:

Citation	Amount
2247898	$100
2247378	$250
2247379	$250

ORDER

The M. A. Walker Company, Inc., IS HEREBY ORDERED to civil penaltics of $600 within 30 days of the date of this decision. Payment is to be made to MSHA, and upon receipt same, this proceeding is DISMISSED.

Roy J. Maurer
Administrative Law Judg

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U. S. Departm of Labor, 801 Broadway, Rm. 280, Nashville, TN 37203 (Cer fied Mail)

Lyle A. Walker, President, M. A. Walker Company, Inc., P. Box 143, McKee, KY 40447 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 86-28-M
	:	A.C. No. 31-00052-05501
v.	:	Pomona Mine & Mill
YATES CONSTRUCTION CO., INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On August 22, 1986, the parties filed a Joint Motion t Approve Settlement and to Dismiss this proceeding. A simil motion was filed in the case of Secretary v. Martin Mariett Aggregates, Docket No. SE 86-31-M, with which this proceedi was consolidated by order issued April 18, 1986.

This proceeding involves three alleged violations, one originally assessed at $2000 and charging a violation of 30 C.F.R. § 56.3005, the others each assessed at $98. By this settlement agreement, the parties propose to amend cit 2385988 charging a violation of § 56.3005 to read as follow

> Respondent's employee operating at a mine site on or about April 15, 1985 wrongfully worked between equipment and the pit wall in violation of 30 C.F.R. § 56.3012.

The parties represent, and I accept the representation, th the amended citation alleges a violation of the standard more directly applicable to the circumstances of this case The settlement agreement proposes that Respondent pay the of $1000 for the violation charged in the amended citation and the assessed amount, $98 for each of the other alleged violations.

The violation charged in citation 2385988 is serious, since it caused or contributed to a fatal accident. Respo states that the violation resulted from an employee violat a previously communicated work rule, and the Secretary doe not contest this assertion. Respondent has no prior histo

Accordingly, IT IS ORDERED that the settlement agreement PPROVED. Respondent is ORDERED to pay the sum of $1,196 in 30 days of the date of this decision. Upon payment, proceeding is DISMISSED. The hearing scheduled st 27, 1986 in Greensboro, North Carolina is CANCELLED.

James A. Broderick
Administrative Law Judge

ribution:

eth R. Keller, Esq., Tuggle, Duggins, Meschan & Elrod, P.A., er X, Greensboro, NC 27402 (Certified Mail)

Michael Shepard, Esq., Schmeltzer, Aptaker & Sheppard, Massachusetts Ave., N.W., Washington, D.C. 20036-1879 rtified Mail)

y A. Auerbach, Esq., U.S. Department of Labor, Office of Solicitor, 1371 Peachtree St., N.E., Rm. 339, Atlanta, GA 7 (Certified Mail)

AUG 28 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 86-31-M A.C. No. 31-00052-05504
v.	:	Pomona Quarry
MARTIN MARIETTA AGGREGATES, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On August 18, 1986, the parties filed a Joint Motion to Approve Settlement and to Dismiss this proceeding. A simila Motion was filed in the case of Secretary v. Yates Construct Co., Inc., Docket No. SE 86-28-M, with which this proceeding was consolidated by order issued April 18, 1986.

The proceeding against Martin Marietta involves two violations alleged in two citations for which penalties in the amount of $4,157 were sought. By the settlement agreeme the Secretary proposes to "withdraw" the two citations and substitute therefor a new citation charging a violation of 30 C.F.R. § 56.3012 which shall read as follows:

> An employee (Daniel Preston Moore) of Yates Construction Company operating at Respondent's mine site on or about April 15, 1985 wrongfully worked between equipment and the pit wall in violation of 30 C.F.R. § 56.3012.

The Secretary represents, and I accept the representat that the new citation alleges a violation of the standard more directly applicable to the circumstances of this case. A penalty of $2000 is proposed for the violation which Resp agrees to pay.

The violation is serious in that it caused or contribu to a fatal accident. Respondent states that it made regula inspections to ensure the safety of the area involved in th

n section 110(i) of the Act, and conclude that it should be pproved.

Accordingly, IT IS ORDERED that the settlement agreement s APPROVED; that citations 2385993 and 2385994 are VACATED. new citation, 2385993 is substituted and Respondent is RDERED to pay within 40 days of the date of this decision, civil penalty in the amount of $2000 for the violation lleged therein. Upon payment of said penalty this proceedin s DISMISSED. The hearing scheduled August 27, 1986 in reensboro, North Carolina is CANCELLED.

James A. Broderick
Administrative Law Judge

istribution:

enneth R. Keller, Esq., Tuggle, Duggins, Meschan & Elrod, P. rawer X, Greensboro, NC 27402 (Certified Mail)

ra Michael Shepard, Esq., Schmeltzer, Aptaker & Sheppard, 18 assachusetts Ave., N.W., Washington, D.C. 20036-1879 (Certif ail)

arry A. Auerbach, Esq., U.S. Department of Labor, Office of olicitor, 1371 Peachtree St., N.E., Rm. 339, Atlanta, GA 0367 (Certified Mail)

lk